

## Ties in the Supreme Court of New Jersey

Edward A. Hartnett\*

In the summer of 2001, two high-profile murder cases, both involving defendants who were minors when they committed their crimes, produced tie votes of three-to-three in courts of last resort. One involved Samuel Manzie, who, at the age of fifteen, killed an eleven year-old boy named Eddie Werner when he came to Manzie's door selling candy.<sup>1</sup> Against the advice of his lawyer and his family, Manzie, himself the victim of sexual abuse by a pedophile,<sup>2</sup> pleaded guilty to murder.<sup>3</sup> He was sentenced to seventy years of imprisonment, with no eligibility for parole until he had served nearly sixty years.<sup>4</sup> The Appellate Division of the New Jersey Superior Court affirmed the seventy-year sentence, but reduced the parole ineligibility period to thirty years, reasoning that New Jersey's No Early Release Act, upon which the trial court had relied in setting the parole ineligibility period, did not apply to murder.<sup>5</sup> The Supreme Court of New Jersey affirmed by a vote of three to three.<sup>6</sup>

The second case involved Napoleon Beazley, who, at the age of seventeen, stole a car by killing its driver, John Luttig.<sup>7</sup> Beazley, the president of his senior class with no prior criminal record,<sup>8</sup> was

---

\* Professor, Seton Hall University School of Law. Thanks to Howard Erichson, John Jacobi, Michael Risinger, Charles Sullivan, and John Wefing for helpful comments and to Christopher Iu for research assistance.

<sup>1</sup> See *New Jersey v. Manzie*, 335 N.J. Super. 267, 762 A.2d 276 (App. Div. 2000).

<sup>2</sup> Laura Mansnerus, *Eddie Was Murdered. Sam's Doing 70 Years. But Who Is to Blame?*, N.Y. TIMES, Aug. 8, 1999, § 14, at 1 (detailing the relationship between Sam Manzie and Stephen Simmons and the unsuccessful efforts of Sam's parents to get him adequate help).

<sup>3</sup> 335 N.J. Super. at 269, 762 A.2d at 277.

<sup>4</sup> *Id.* at 267, 762 A.2d at 276.

<sup>5</sup> *Id.* at 270-71, 762 A.2d at 278.

<sup>6</sup> *State v. Manzie*, 168 N.J. 113, 773 A.2d 659 (2001). Justice Verniero was recused.

<sup>7</sup> See *Beazley v. Johnson*, 242 F.3d 248, 253-55 (5th Cir. 2001) (describing the circumstances of the crime, including testimony that Beazley wanted to "see what it [was] like to kill somebody," and his unsuccessful attempt to also kill Mrs. Luttig).

<sup>8</sup> See *Editorial*, NEWSDAY, Aug. 17, 2001, at A48.

convicted of capital murder and sentenced to death.<sup>9</sup> The Court of Appeals for the Fifth Circuit rejected Beazley's contention that the Eighth Amendment and the International Covenant on Civil and Political Rights bar the execution of someone who was a minor at the time of the crime.<sup>10</sup> Beazley's application for a stay of execution pending certiorari was denied by a tie vote of the Supreme Court of the United States.<sup>11</sup>

The New Jersey Supreme Court decision in *Manzie* has been criticized for failing to resolve the important legal issue involved.<sup>12</sup> The United States Supreme Court decision in *Beazley* has been assailed on the ground that "a tie shouldn't go to the executioner."<sup>13</sup>

---

<sup>9</sup> See *Beazley*, 242 F.3d at 253.

<sup>10</sup> *Id.* at 263-69. Four Justices have subsequently urged the Court to revisit the Eighth Amendment question and "put an end to this shameful practice" of executing someone who was a minor at the time of the crime. In re Stanford, 537 U.S. 968 (2002) (Stevens, J., joined by Souter, Ginsburg, and Breyer, JJ., dissenting from denial of petition for writ of habeas corpus).

<sup>11</sup> *Beazley v. Johnson*, 533 U.S. 969 (2001). The application was made to Justice Scalia as Circuit Justice for the Fifth Circuit. He recused himself, resulting in the distribution of the application to Justice Kennedy, the next Justice in order of seniority. See Sup. Ct. R. 22.3 (providing that when the appropriate Circuit Justice is unavailable for any reason, the application is distributed to the "Justice then available who is next junior to the Circuit Justice"). Justice Kennedy, as is common on applications to stay an execution, referred it to the full court. See generally ROBERT L. STERN & EUGENE GRESSMAN, SUPREME COURT PRACTICE § 17.20 (8th ed. 2002). The application was denied on a three to three vote, with Justices Stevens, Ginsburg, and Breyer voting to grant the application and Justice Scalia, Souter, and Thomas recused. *Beazley*, 533 U.S. at 969. Evidently, Justices Scalia, Souter, and Thomas recused themselves because of their relationship to United States Circuit Judge J. Michael Luttig, the son of the murder victim. See Raymond Bonner, *Three Abstain as Supreme Court Declines to Halt Texas Execution*, N.Y. TIMES, Aug. 14, 2001, at A-1. The petition for certiorari was later denied without recorded dissent. *Beazley v. Cockrell*, 549 U.S. 945 (2001).

<sup>12</sup> Editorial, *When Is 'Necessary'?*, N.J. L.J., Aug. 20, 2001, at 18 (describing the concurring opinion issued by three justices in *Manzie* as "either the law to be followed or an interesting academic exercise" and calling for full complement of justices to avoid evenly divided court); Brief in Support of Motion for Rehearing at 3, *State v. Manzie*, 168 N.J. 113, 773 A.2d 659 (2001) (No. 50,608) (seeking rehearing and arguing that "litigants before this Court deserve no less" than a majority opinion "in a case of this magnitude"); see also Thomas E. Baker, *Why We Call the Supreme Court "Supreme,"* 4 GREEN BAG 2D 129 (2001) (criticizing equal divisions in the Supreme Court of the United States for the same reason).

<sup>13</sup> Bonner, *supra* note 11 (quoting George Kendall of the NAACP Legal Defense and Education Fund, Inc.); Editorial, *Defy Death, In Appeals of Capital Cases, Judges' Tie Votes Should Work in Favor of the Condemned*, NEWSDAY, Aug. 17, 2001, at A48 (asserting that "under court rules, a tie is a win for the executioner," and arguing that "court officials should change the rule about ties in capital cases"); see also Editorial, *Hanging Crimes? / Teen Killer, Dozing Lawyer Try Texans on Death Penalty*, HOUS. CHRON., Aug. 16, 2001, at 26 (stating that "[u]nder the Supreme Court rules, a tie goes to the prosecution").

In this article, I explore the state law provisions for temporary assignments to the Supreme Court of New Jersey, a mechanism that has been suggested as a way to avoid or break ties, and argue that, as a matter of state constitutional law, such assignments should be made only when necessary to achieve the required quorum of five. This exploration leads to a broader conclusion that the New Jersey Constitution prohibits the recall and temporary assignment to *any* court of retired justices and judges who have reached the mandatory retirement age of seventy. In a companion article, I defend the traditional practice of the Supreme Court of the United States and respond to various suggestions that have been made for avoiding or breaking ties in that court, but recommend a statutory change addressing stays of execution upon the grant of certiorari.<sup>14</sup>

## I

### THE PRACTICE OF AFFIRMANCE BY AN EQUALLY DIVIDED COURT AND THE POSSIBILITY OF A TEMPORARY REPLACEMENT

In affirming the judgment of the Appellate Division in *Manzie*, the New Jersey Supreme Court applied the longstanding principle that applies generally in multimember bodies governed by majority rule: the body cannot take any affirmative action based on a tie.<sup>15</sup> As Justice Field explained in 1868 in *Durant v. Essex Company*:

It has long been the doctrine in this country and in England, where courts consist of several members, that no affirmative action can be had in a cause where the judges are equally divided in opinion as to the judgment to be rendered or order to be made.<sup>16</sup>

New Jersey has recognized this general principle that an equally

---

<sup>14</sup> Edward A. Hartnett, *Ties in the Supreme Court of the United States*, 44 WM. & MARY L. REV. 643 (2002).

<sup>15</sup> There is even a Latin maxim, *semper praesumitur pro negante*, that is, it is always to be presumed in favor of the negative. See Reporter's Note following *Krebs v. Carlisle Bank*, 14 F. Cas. 856, 862 (C.C.E.D. Pa. 1850) (No. 7932) (Grier, Circuit Justice). At the argument of *Durant v. Essex Co.*, 74 U.S. 107 (1868), the leading Supreme Court case regarding affirmance by an equally divided court, Justice Grier interrupted the argument to refer counsel to this note, describing it as "clear and satisfactory." See also THE LAW DICTIONARY at 363 (Anderson Publishing, 7th ed. 1997) (translating the maxim as "the presumption is always in favor of the negative").

<sup>16</sup> *Durant*, 74 U.S. at 107; see also, e.g., *Bridges v. Tunnel*, 2 Del. Cas. 451 (Del. 1818) (affirming, by an equally divided court, judgment of freedom for slave who was sold with intent to export); *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792) (denying, by an equally divided court, a motion for mandamus).

divided court cannot take affirmative action.<sup>17</sup> In addition, the Supreme Court of New Jersey and its predecessor, the Court of Errors and Appeals of New Jersey, have adhered to this principle's most common application: an equally divided appellate court affirms the judgment reviewed.<sup>18</sup>

In contrast to the inability of the Supreme Court of the United States to temporarily replace one of its absent justices,<sup>19</sup> there is a provision in New Jersey law to temporarily assign a judge to sit for an absent member of the Supreme Court of New Jersey.<sup>20</sup> The circumstances in which such a temporary replacement will actually be made, however, are not clear.

After the affirmance by an equally divided court in *Manzie*, the Attorney General of New Jersey moved for rehearing "with a seventh jurist sitting temporarily to fill Justice Verniero's seat," arguing that "litigants before this Court deserve no less" than a majority opinion "in a case of this magnitude."<sup>21</sup> The Supreme Court denied the motion without comment.<sup>22</sup> Two decisions issued on the same day and in the same week in which the *Manzie* petition for rehearing was denied illustrate how little rhyme or reason there seems to be as to when a temporary replacement will be used for an absent justice. Both cases involved the registration of sex offenders. In one case, two justices did not participate and both were temporarily replaced, bringing the court to full strength;<sup>23</sup> in the other, three justices did not participate but only one was temporarily replaced.<sup>24</sup>

---

<sup>17</sup> See *Gallena v. Scott*, 1 N.J. 430, 432, 64 A.2d 77, 77 (1949) (noting that an equally-divided court had denied an application for common law certiorari).

<sup>18</sup> See, e.g., *State v. Manzie*, 168 N.J. 113, 773 A.2d 659 (2001); *Manasquan River Reg'l Sewerage Auth. v. Ocean County Utils. Auth.*, 117 N.J. 239, 566 A.2d 186 (1989); *Di Costanzo v. Matthews Constr. Co.*, 58 N.J. 159, 275 A.2d 740 (1971); *Seiler v. Robinson*, 13 N.J. 307, 99 A.2d 422 (1953); *Vanagas v. Vanagas*, 1 N.J. 335, 63 A.2d 531 (1949); *Ebling Brewery v. Heirloom*, 142 N.J. Eq. 245, 59 A.2d 661 (1948); *Colligan v. 680 Newark Ave. Realty*, 131 N.J.L. 520, 37 A.2d 206 (1944); *Ex parte Hague*, 104 N.J. Eq. 369, 145 A. 618 (1929); *Kaighn v. Fuller*, 15 N.J. Eq. 501 (1863).

<sup>19</sup> See Hartnett, *supra* note 14.

<sup>20</sup> See N.J. CONST. art. VI, § 2, ¶ 1; N.J. R. 2:13-2.

<sup>21</sup> Brief in Support of Motion for Rehearing at 3, *State v. Manzie*, 168 N.J. 113, 773 A.2d 659 (2001) (No. 50,608).

<sup>22</sup> See Kathy Barrett Carter, *Manzie's Pared Prison Term Stands*, STAR-LEDGER (Newark, N.J.), July 19, 2001, at 21.

<sup>23</sup> *In re Registrant J.G.*, 169 N.J. 304, 777 A.2d 891 (2001). Chief Justice Poritz and Justice Verniero did not participate, and were replaced by Appellate Division Judges Carchman and Wells.

<sup>24</sup> *In re Registrant M.F.*, 169 N.J. 45, 776 A.2d 780 (2001). Chief Justice Poritz and Justices Long and Verniero did not participate; Appellate Division Judge Wells was the only judge temporarily assigned as a replacement. See also Michael Booth, *Lawyers Beg for Leniency in Cases of Flubbed Affidavits of Merit*, N.J. L.J., Sept. 29, 2003, at

In light of the continued uncertainty regarding temporary replacements for absent justices, and the suggestion that such replacements should be used to avoid or break equal divisions, it is time to analyze closely the history and meaning of the constitutional provision authorizing temporary assignment of judges to the New Jersey Supreme Court.<sup>25</sup> Indeed, a case decided as this article goes to

---

4 (describing cases argued on a single day and noting the temporary replacement in cases where Justice Verniero was recused, but not noting any temporary replacement in a case in which Justice Wallace was recused).

<sup>25</sup> A number of other states have provisions on the same general subject, but vary widely regarding the circumstances in which temporary assignments can be made, who makes those assignments, and who is eligible for those assignments. See ALA. CODE § 12-2-14 (2002) (temporary appointment of a member of bar of Supreme Court upon equal division or to achieve quorum); ALASKA CONST. art. IV, § 16; ARIZ. CONST. art. VI, § 3; ARK. CONST. amend. 80, § 13 (temporary assignments by Governor, or if Governor fails to act, by Chief Justice); CAL. CONST. art. VI, § 6; COLO. CONST. art. VI, § 5; CONN. STAT. § 51-204 (2003); DEL. CONST. art. 4, § 38 (temporary assignment to Supreme Court only to “fill up the number of that Court to the required quorum”); FLA. CONST. art. V, § 3 (temporary assignments when “recusals for cause would prohibit the court from convening”); GA. CONST. art. 6, § 6, ¶ 1 (remaining Justices may designate substitute judge); HAW. CONST. art. 6, § 2; IDAHO CONST. art. 5, § 6; ILL. CONST. art. 6, § 16; IOWA CODE § 602.1612 (2002); KAN. STAT. ANN. § 20-2616 (2002); KY. CONST. § 110 (temporary appointment by Governor if two or more Justices decline or are unable to sit); LA. CONST. art. 5, § 5; ME. REV. STAT. ANN. tit. 4, § 6 (West 2003) (Governor may appoint retired justice an “Active Retired Justice” for seven-year term, and Chief Justice may assign an Active Retired Justice to judicial duties); MD. CONST. art. 4, §§ 3A, 18; MASS. GEN. L. ch. 211, § 24 (2003); MICH. COMP. L. ANN. §§ 600.225, 600.226 (West 2003); MINN. CONST. art. 6, § 2; MISS. CONST. art. 6, § 165 (if attorneys in case do not agree on “member of the bar to preside” in place of disqualified judge, Governor may commission a person “of law knowledge”); MO. CONST. art. 5, § 6; MONT. CONST. art. VII, § 3; NEB. CONST. art. V, § 2 (Supreme Court may appoint lower court judges to act as associate judges of Supreme Court and constitute two five-judge divisions of Supreme Court); NEV. CONST. art. V, § 4 (Governor may designate lower court judge to sit for disabled or disqualified justice); N.H. REV. STAT. ANN. § 490:3 (2002); N.M. CONST. art. VI, § 6 (remaining justice “may, in their discretion,” call in “any district judge”); N.Y. CONST. art. 6, § 2; N.C. GEN. STAT. §§ 7A-39.3, 7A-39.5 (2003); N.D. CONST. art. VI, § 11; OHIO CONST. art. IV, § 2; OKLA. CONST. art. VII, § 6; OR. CONST. art. VII, § 2a; R.I. GEN. L. ANN. § 8-3-8 (2002); S.C. CODE ANN. § 14-3-60 (Law. Co-op. 2002) (Governor “shall immediately commission specially the requisite number of men learned in the law” when justices of Supreme Court disqualified or otherwise prevented from presiding); S.D. CONST. art. 5, § 11; TENN. CONST. art. 6, § 11 (Governor “shall forthwith specially commission the requisite number of men, of law knowledge” when justices of Supreme Court disqualified); TEX. CONST. art. 5, § 11 (Governor “shall immediately commission the requisite number of persons learned in the law” when justices of Supreme Court disqualified); UTAH CONST. art. 8, § 2; 4 VT. STAT. ANN. tit. 4, § 22 (2002); WASH. CONST. art. 4, § 2(a); W. VA. CONST. art. 8, § 2; WYO. CONST. art. 5, § 4; see also Stephen R. Barnett & Daniel R. Rubinfeld, *The Assignment of Temporary Justices in the California Supreme Court*, 17 PAC. L.J. 1045, 1185-97 (1986) (providing a table of laws and practices concerning the assignment of temporary justices to state supreme courts); *Yelle v. Kramer*, 520 P.2d 927 (Wash. 1964) (decision by nine retired judges, chosen at random, when every member of Supreme

press provides a dramatic illustration of the importance of a proper application of this constitutional provision. In *McNeil v. Legislative Apportionment Committee*,<sup>26</sup> the Appellate Division held that the state legislative districting scheme violated a provision of the New Jersey Constitution governing the boundaries of state legislative districts. The Supreme Court of New Jersey reversed, concluding that compliance with the state constitutional provision would have violated the federal Voting Rights Act.<sup>27</sup> Chief Justice Poritz was recused (apparently because she had appointed the tie-breaking member of the Apportionment Committee) and Judge Pressler sat in her stead. Judge Pressler joined Justices Coleman, Long, and Zazzali to constitute the majority, while Justices Verniero, Albin, and LaVecchia dissented.<sup>28</sup> Absent the temporary assignment of Judge Pressler, there would have been no majority to reverse the judgment of the Appellate Division and order the dismissal of the complaint.<sup>29</sup>

---

Court was disqualified). *But see* *State ex rel. Mass. Transp. Auth. v. Ind. Revenue Bd.*, 254 N.E.2d 1 (Ind. 1969) (dismissing petition seeking the appointment of a special judge, where motion for transfer had been denied by equally divided court, because of absence of any legal authority to do so); VA. CONST. art. 6, § 4 (Chief Justice may temporarily assign active or retired judge "to any court of record except the Supreme Court"); WIS. CONST. art. 7, §§ 4, 24 (temporary assignment of active or retired judge to "any court of record except the Supreme Court."). *See also* Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877, 1936 n.234 (1988) (citing various state constitutional and statutory provisions authorizing temporary judges).

<sup>26</sup> 357 N.J. Super. 74, 813 A.2d 1264 (App. Div. 2003), *rev'd*, 177 N.J. 364, 828 A.2d 840 (2003).

<sup>27</sup> *McNeil*, 177 N.J. 364, 828 A.2d 840. The Voting Rights Act is codified at 42 U.S.C. § 1973 (2000). The state constitutional provision held invalid would have required that Newark and Jersey City each be divided between two legislative districts rather than parceled out into three. N.J. CONST. art. IV, § 2, ¶ 3.

<sup>28</sup> *McNeil*, 177 N.J. at 400, 828 A.2d at 862 (Verniero, J., joined by Albin, J., dissenting); *id.* at 401, 828 A.2d at 863 (LaVecchia, J., dissenting).

<sup>29</sup> If Judge Pressler had not participated, it is possible, although not likely, that the result would have been an affirmance by an equally-divided court. Justices Coleman, Long, and Zazzali voted to reverse and order the dismissal of the complaint; Justices Verniero and Albin voted to remand for further proceedings; and Justice LaVecchia appears to have favored affirmance, although she stated that she "would have gone along with [those] who argue for a remand." *Id.* at 406, 828 A.2d at 865; *see also* *McNeil v. Legislative Apportionment Comm'n*, 176 N.J. 484, 485, 825 A.2d 1124, 1125 (2003) (LaVecchia, J., dissenting from grant of stay). In that circumstance, the case would have presented a judgment impasse, where various judges favor three different judgments (affirm, remand for further proceedings, reverse) and none of the three positions is supported by a majority. If faced with a judgment impasse, two or more of the Justices would likely have switched and voted for a remand in order to avoid the impasse. *See* Hartnett, *supra* note 14, at 669-73 (arguing that avoiding a judgment impasse is the only circumstance in which a judge should switch his or her vote and noting that the pattern in the Supreme Court of the United States is for a judge who favors affirmance or reversal to switch to a

*McNeil* also illustrates the importance of clarifying whether Supreme Court Justices may properly be recalled from retirement and temporarily assigned to the Supreme Court, and whether any judge can decide cases after reaching the mandatory retirement age of seventy. Justice Coleman was a member of the Supreme Court when *McNeil* was argued.<sup>30</sup> He retired on May 4, 2003, and his successor, Justice Wallace, took office on May 20, 2003.<sup>31</sup> Nevertheless, Justice Coleman participated in the *McNeil* decision and delivered the opinion of the court on July 31, 2003, well after his mandatory retirement.<sup>32</sup> If the case had been decided with a quorum of five, with neither Judge Pressler replacing Chief Justice Poritz nor Justice Coleman participating after his mandatory retirement, the case would have come out the other way. Rather than a four-to-three decision reversing the Appellate Division and dismissing the complaint, there would have been a three-to-two decision remanding the case for further proceedings to determine if legislative districts could be drawn that would comply with both the state constitution and the federal Voting Rights Act.

## II

### THE PROCEEDINGS IN THE CONSTITUTIONAL CONVENTION

The people of New Jersey adopted a new constitution in 1947. That constitution “completely reshaped its courts,”<sup>33</sup> putting New

---

remand in order to avoid the impasse).

What if the court found itself evenly divided between reversal and remand? This presents a permutation I did not directly consider in the companion article criticizing switching votes to avoid an affirmance by an equally-divided court. *See id.* at 666 (noting that neither of the principles that appear to guide vote switching in the judgment impasse situations “would be of any help to a Court that is equally divided between affirmance and reversal”). An equal division between reversal and remand may well present another situation in which a vote switch is appropriate in order to avoid an affirmance that none of the judges thinks appropriate. *Cf. id.* at 671-72 (arguing against affirmance rather than vote switching in the face of a judgment impasse and noting the difficulty of accepting an affirmance where a majority find the judgment under review erroneous).

<sup>30</sup> *See* 177 N.J. at 364, 828 A.2d at 840 (noting the date of argument). He also presided when the stay of the judgment of the Appellate Division was issued on March 6, 2003. *See* 176 N.J. at 484, 825 A.2d at 1124.

<sup>31</sup> *See* 175 N.J. vii (2003).

<sup>32</sup> *See infra* text accompanying notes 83-88 (discussing participation in cases argued before retirement but decided after retirement).

<sup>33</sup> Benjamin Kaplan & Warren J. Greene, *The Legislature's Relation to Judicial Rule-Making: An Appraisal of Winberry v. Salisbury*, 65 HARV. L. REV. 234, 234 (1951). Noting the 1950 claim by its Attorney General that New Jersey had “the most modern, up-to-date and efficient system of courts and practice in the world today,”

Jersey, according to Roscoe Pound, "in the lead among American jurisdictions in provision of a judiciary organized and empowered to administer justice speedily, efficiently, and at no more than reasonable expense in the complex, urban, industrial society of today."<sup>34</sup> At the apex of this new judiciary was a new seven-member Supreme Court. This Court replaced the former Court of Errors and Appeals, which consisted of ten judges who also sat on other courts, plus six lay judges. The change has been widely regarded as a resounding success, and the new Supreme Court "appears on every list of innovative or prestigious courts."<sup>35</sup>

One of the witnesses at the hearings conducted by the Constitutional Convention's Committee on the Judiciary was future United States Supreme Court Justice William J. Brennan, Jr., then an Associate Editor of the New Jersey Law Journal. He presented an editorial from that Journal arguing that the Court of Errors and Appeals should be replaced and that the size of the new highest court should be "either five or seven members."<sup>36</sup> If an intermediate appellate division were created with the power to hear "all law and chancery appeals," then five should be adequate, but if "direct appeals from the law and chancery divisions" were to go to the highest court, then "a seven-member court would seem more advisable."<sup>37</sup>

The next witness before the committee was Justice Frederic Colie, who sat on the Court of Errors and Appeals. He suggested that the new highest court "should in the final analysis, probably be a seven-man court . . . because that gives a little leeway for illness and temporary disabilities of one sort or another—leeway that would be lacking in a court of five."<sup>38</sup>

On July 24, the judiciary committee released for public comment a tentative draft of the judicial article of the constitution. It

---

Kaplan and Greene state that "[a]ny element of exaggeration in this statement may be attributed to a pardonable pride in the state's massive accomplishments during the past few years." *Id.*

<sup>34</sup> Roscoe Pound, *Procedure Under the Rules of Court in New Jersey*, 66 HARV. L. REV. 28, 28 (1952).

<sup>35</sup> John B. Gates & Charles A. Johnson, *THE AMERICAN COURTS, A CRITICAL ASSESSMENT* 111 (1991); see also G. ALAN TARR & MARY C. ALDIS PORTER, *STATE SUPREME COURTS IN STATE AND NATION* 268-69 (1988) ("[I]n terms of overall influence, national reputation, and innovation, the only court comparable to the New Jersey Supreme Court—and perhaps even paramount to it—is the California Supreme Court.").

<sup>36</sup> 4 N.J. CONST. CONV. 201 (July 2, 1947).

<sup>37</sup> *Id.* at 201-02.

<sup>38</sup> *Id.* at 207 (July 3, 1947).



provided, in relevant part:

The Supreme Court shall consist of a Chief Justice and six Associate Justices. Five members of the court shall constitute a quorum. When necessary to make the quorum, the Chief Justice shall assign the Judge or Judges of the General Court, senior in service, as provided by rules of the Supreme Court, to serve temporarily in the Supreme Court.<sup>39</sup>

In providing for a temporary assignment to the Supreme Court only when necessary to make the quorum, the tentative draft echoed a large number of prior proposals, including the 1942 Report of the Commission on Revision of the New Jersey Constitution,<sup>40</sup> the Proposed Revised Constitution of 1944,<sup>41</sup> the Recommendations of the League of Women Voters of New Jersey,<sup>42</sup> and the draft of the judiciary article submitted by the Bergen County Bar Association.<sup>43</sup>

On July 29, 1947, the committee met in executive session and, on July 30, 1947, conducted a public hearing on the tentative draft.<sup>44</sup> There is no record of the executive session, and no one at the public hearing suggested expanding the circumstances in which a temporary replacement for an absent justice could be made. Two speakers, however, suggested a requirement that where a bare quorum of five were present, four should be necessary to a decision.<sup>45</sup> On July 31, 1947, the committee presented its proposal to the full convention. The relevant paragraph now read:

The Supreme Court shall consist of a Chief Justice and six Associate Justices. Five members of the court shall constitute a quorum. When necessary, the Chief Justice shall assign the Judge or Judges of the General Court, senior in service, as provided by rules of the Supreme Court, to serve temporarily in the Supreme Court.<sup>46</sup>

Thus, the phrase “when necessary to make the quorum,” was shortened to simply “when necessary.” As adopted by the convention

---

<sup>39</sup> *Tentative Draft of Judicial Article § 2, ¶ 1, in 2 N.J. CONST. CONV.* 1167 (July 24, 1947).

<sup>40</sup> 4 N.J. CONST. CONV. 556, 561 (appendix).

<sup>41</sup> *Id.* at 566. This proposed constitution was defeated by the electorate on November 7, 1944.

<sup>42</sup> *Id.* at 595 (submitted to the convention in June of 1947).

<sup>43</sup> *Id.* at 254 (submitted to the Judiciary Committee of the convention on July 3, 1947).

<sup>44</sup> *See id.* at iii.

<sup>45</sup> *Id.* at 508 (statement of Joseph A. Davis); *id.* at 523 (statement of Howard Ewart).

<sup>46</sup> *Proposal 4-1, Committee on the Judiciary, Judicial Article § 2, ¶ 1, in 2 N.J. CONST. CONV.* 1174 (July 31, 1947).

and the people, the name of the General Court was changed to "Superior Court," but the sentences quoted above were otherwise left unchanged.<sup>47</sup> The key question is whether the deletion of "to make a quorum" was merely a stylistic change, or if it broadened the circumstances in which a temporary assignment is to be made.

### III

#### AN ANALYSIS OF THE CONSTITUTIONAL TEXT

Although the matter is not free from doubt, the shortening of the phrase "when necessary to make the quorum" to simply "when necessary" is best understood as merely a stylistic change.

The word "necessary" is inherently a term of relation. Although it does admit of degrees—ranging from strict relationship of mathematical, logical, or physical requirement to a looser relationship of convenience or usefulness<sup>48</sup>—it nevertheless remains a term of relation: It is impossible to determine whether something is necessary, in *either* a strict *or* a loose sense, without asking "necessary to what?" In this context, following as it does immediately after the sentence establishing five as a quorum, the most natural reference for the term "necessary" is to the quorum. Viewed this way, it is easy to see how a committee, particularly one urged to be "brief and very much to the point,"<sup>49</sup> might delete as superfluous the rather inelegant phrase "to make the quorum."

If "necessary" does not refer to the quorum, then to what does it

---

<sup>47</sup> N.J. CONST. art. VI, § 2, ¶ 1. An additional sentence was also added to the end of the paragraph: "In case the Chief Justice is absent or unable to serve, a presiding Justice designated in accordance with rules of the Supreme Court shall serve temporarily in his stead." *Id.*

<sup>48</sup> See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Although *McCulloch* reads the Necessary and Proper Clause in the United States Constitution to require only a loose relationship between the particular congressional act and the enumerated congressional power, the relationship remains. See U.S. CONST. art. I, § 8 (providing for power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any Department or Officer thereof").

<sup>49</sup> 4 N.J. CONST. CONV. at 430 (July 10, 1947) (statement of Governor Alfred E. Driscoll). Governor Driscoll added that the judiciary committee should "follow the example of the Federal Constitution [so] that you men and women will be known in the future as much by what you didn't put in the constitution as by what you have put in." *Id.* The lead monograph prepared by the Governor's Committee on Preparatory Research for the New Jersey Constitutional Convention made the same point: "Other things being equal, the shorter the constitution is, the better." W. Brooke Grave, *What a Constitution Should Contain*, in 2 N.J. CONST. CONV. 1329 (1947).

refer? Perhaps it skips over the sentence immediately prior and refers to the first sentence in the paragraph describing the full court, so that temporary assignment are to be made when necessary to bring the court to its full membership of seven. This construction, however, does more than skip over the quorum sentence in search of a different reference; instead, it effectively eliminates that sentence from the constitution entirely.

Perhaps “necessary” does not have a textual reference in section 2 at all, but instead refers to the “judicial power” in section 1, so that temporary assignments are to be made when necessary to carry out the judicial power.<sup>50</sup> This is certainly a more plausible construction than that just considered, but if the “judicial power” is the correct reference, we must confront the question of degree of necessity. Are temporary assignments to the Supreme Court to be made only when strictly necessary to the judicial power, or are they to be made when they are convenient or useful to the judicial power? The strict view of necessity would give the Chief Justice a mandatory, almost ministerial, duty of assignment when there is no other way to carry out the judicial power. The loose view of necessity would, by contrast, give the Chief Justice a broadly discretionary power to make assignments to the Supreme Court in the interests of wise judicial administration.

In choosing between these, it is significant that the duty imposed on the Chief Justice is a mandatory one: “When necessary, the Chief Justice *shall* assign . . . .”<sup>51</sup> There is little sense in imposing a mandatory duty on someone while leaving the determination of when that duty is triggered to that person’s discretion. Instead, if a discretionary power to further wise judicial administration were intended, one would expect that the power would be permissive, not mandatory. Indeed, this is precisely how the power of the Chief Justice to temporarily transfer lower court judges among those courts is phrased: “The Chief Justice . . . *may* from time to time transfer Judges for one assignment to another, as need appears.”<sup>52</sup> Thus, the mandatory duty imposed on the Chief Justice to make a temporary

---

<sup>50</sup> See N.J. CONST. art. VI, § 1, ¶ 1 (“The judicial power shall be vested in a Supreme Court, . . .”).

<sup>51</sup> *Id.* § 2, ¶ 1 (emphasis added).

<sup>52</sup> *Id.* § 7, ¶ 2 (emphasis added). This section also imposes a mandatory duty on the Chief Justice to assign judges of the Superior Court to the Divisions and Parts of the Superior Court. *Id.* While discretionary determinations of judicial administration obviously go into such assignments, this duty is phrased in mandatory terms because without such assignments, the constitutionally required divisions of the Superior Court simply could not operate. See N.J. CONST. art. VI, § 3, ¶ 3 (“The Superior Court shall be divided into an Appellate Division, a Law Division, and a Chancery Division.”).

assignment to the Supreme Court “when necessary” strongly suggests that the narrower sense of “necessary” is the correct interpretation.

Notice that these two different routes bring us to the same place. If “necessary” refers to the quorum, then temporary assignments to the Supreme Court are to be made only when that court would otherwise lack a quorum. Yet even if “necessary” refers to the judicial power, the mandatory nature of the duty of assignment leads to the same conclusion, for a temporary assignment is strictly necessary to the judicial power only when the court would otherwise lack a quorum.<sup>53</sup>

Two contrary arguments must be considered. First, the constitution envisions that temporary assignments to the Supreme Court will be made in accordance with “rules of the Supreme Court.”<sup>54</sup> One could argue that there would be scant need for rules if temporary assignments were only available to make the quorum; instead, such rules would establish the broader circumstances in which wise judicial administration called for temporary assignments.

There is, however, a better reading of the provision regarding the rules of the Supreme Court. The full sentence reads, “When necessary, the Chief Justice shall assign the Judge or Judges of the Superior Court, senior in service, as provided by rules of the Supreme Court, to serve temporarily in the Supreme Court.”<sup>55</sup> The placement of the phrase “as provided by rules of the Supreme Court” indicates that it modifies the phrase, “senior in service,” not the verb “assign.” That is, the rules are to provide the method for determining seniority in service, nothing more.<sup>56</sup> If it seems odd to think that a rule might

---

<sup>53</sup> The New Jersey Constitution imposes certain mandatory appellate jurisdiction on the Supreme Court of New Jersey. *See* N.J. CONST. art. § 5, ¶ 1; *cf.* U.S. CONST. art. III, § 2 (providing for appellate jurisdiction in the Supreme Court of the United States “with such exceptions . . . as the Congress shall make”). When the Supreme Court of the United States lacks a quorum of six, *see* 28 U.S.C. § 1 (2000), and does not expect to obtain a quorum for the case at the next term, the usual result is an affirmance “with the same effect as upon affirmance by an equally divided court.” 28 U.S.C. § 2109. If the case is a direct appeal from a district court, it may be remitted to the appropriate court of appeals. *Id.*

<sup>54</sup> N.J. CONST. art. VI, § 2, ¶ 1.

<sup>55</sup> *Id.* § 2, ¶ 1.

<sup>56</sup> *See, e.g.,* Barnhart v. Thomas, 124 S. Ct. 376 (2003) (applying the “grammatical ‘rule of the last antecedent,’ according to which a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows”); *cf.* Winberry v. Salisbury, 5 N.J. 240, 256, 74 A.2d 406, 414 (1950) (Case, J., concurring in the judgment) (observing that “the words ‘subject to law’ are carefully placed [in the sentence “The Supreme Court shall make rules governing the administration of all courts in the State and, subject to law, the practice and procedure in all such courts”] to bear upon rules concerning practice and procedure and not to bear upon rules governing the administration of the courts”).

be necessary to determine seniority in service, recall that the 1947 Constitution completely overhauled the judiciary. Rules would be needed to determine seniority among those judges who all became judges of the Superior Court simultaneously upon that court's creation.<sup>57</sup>

The second contrary argument draws on an appendix to the Report of the Judiciary Committee of the Convention, which states:

The provision for supplementing the membership of the Supreme Court is operative whenever a Justice is unavailable at the time a case is argued or submitted. Provisions of this general character are found in several state constitutions, notably that of New York, to which it was added in 1915 upon recommendation of the Court of Appeals.<sup>58</sup>

This passage does tend to support the argument that temporary assignment are to be made "whenever a justice is unavailable," not only when the court would otherwise lack a quorum. But it does so only at the expense of gutting the quorum requirement itself. That is, if the report is correct, and the provision is "operative" whenever a justice is unavailable at the time of argument or submission, the Chief Justice "shall assign" a temporary judge whenever a justice is unavailable at that time. If the Chief Justice must appoint a temporary justice whenever necessary to bring the court up to its full complement of seven at the time of argument or submission, then the constitutional provision that five constitute a quorum is for naught, except in those cases where a justice becomes unavailable only *after* the case is argued or submitted.

The report's reference to the New York Constitution does not advance the argument for a discretionary assignment power in New Jersey.<sup>59</sup> The language of the New York Constitution is expressly

---

<sup>57</sup> N.J. CONST. art. XI, § 4, ¶ 1.

Subsequent to the adoption of this Constitution the Governor shall nominate and appoint, with the advice and consent of the Senate, a Chief Justice and six Associate Justices of the new Supreme Court from among the persons then being the Chancellor, the Chief Justice and Associate Justices of the old Supreme Court, the Vice Chancellors and Circuit Court Judges. The remaining judicial officers enumerated and such Judges of the Court of Errors and Appeals as have been admitted to the practice of law in this State for at least ten years, and are in office on the adoption of the Constitution, shall constitute the Judges of the Superior Court.

*Id.*

<sup>58</sup> *Report of the Committee on the Judiciary*, in 2 N.J. CONST. CONV. 1190 (August 26, 1947).

<sup>59</sup> The intended reference is almost certainly to a 1925 amendment providing, "In case of the temporary absence or inability to act of any judge of the court of

discretionary, in sharp contrast to the non-discretionary language of the New Jersey Constitution. The New York Constitution provides that the court “may designate,” whereas the New Jersey Constitution provides that the Chief Justice “shall assign.”

Moreover, there is another compelling reason for rejecting an argument based on this passage from the Judiciary Committee Report, a reason that bristles with irony. In one of the earliest and most significant decisions of the post-1947 New Jersey Supreme Court, *Winberry v. Salisbury*, the court claimed for itself the *exclusive* power to make rules of practice and procedure—that is, it denied the legislature any power to make such rules.<sup>60</sup> The court reached this conclusion in the teeth of the following passage from the Report of the Judiciary Committee:

This Court was given the power to make rules for administration, practice and procedure in all courts, subject to the overriding power of the Legislature with respect to practice and procedure.<sup>61</sup>

The court explicitly rejected that Report as an authoritative guide to interpreting the constitution, stating that it “cannot be deemed a part of the parliamentary history of the Constitution, for it was not known to and was not acted upon by the members of the Constitutional Convention in voting in favor of Article VI, creating a new judicial system.”<sup>62</sup> Thus the strongest support for a broader power of temporary assignment is undercut by the court’s own bold decision in *Winberry*, in which it rejected this evidence of contrary intent of the convention in order to read its power over practice and procedure expansively.

---

appeals, the court may designate any justice of the supreme court to serve as associate judge of the court during such absence or inability to act.” N.Y. CONST. art. VI, § 5 (1925), in NEW YORK STATE CONSTITUTIONAL CONVENTION COMMITTEE, AMENDMENTS PROPOSED TO NEW YORK CONSTITUTION 1895-1937, at 473 (1937). Nothing was added to the relevant section of the New York Constitution in 1915. See *id.* at 403-14 (detailing history of proposals to amend the section of the New York Constitution dealing with the Court of Appeals from 1895-1925). In 1899, New York did adopt a provision empowering the governor to designate lower court judges to sit temporarily on Court of Appeals either to fill vacancies or to effectively expand its membership in order to reduce backlogs. *Id.* at 406.

<sup>60</sup> 5 N.J. 240, 250, 74 A.2d 406, 411 (1950).

<sup>61</sup> *Report of the Committee on the Judiciary*, in 2 N.J. CONST. CONV. 1183 (Aug. 26, 1947), quoted in *Winberry*, 5 N.J. at 248.

<sup>62</sup> *Winberry*, 5 N.J. at 248, 74 A.2d at 410.

## IV

THE UNDERSTANDING OF THE CONSTITUTIONAL TEXT REVEALED BY  
THE ORIGINAL RULES OF COURT, THE 1953 REVISED RULES, AND THE  
PRACTICE OF THE NEW SUPREME COURT

Thus far, I have argued that the temporary assignment provision should be interpreted as a narrow, mandatory duty applicable only when the court would otherwise lack a quorum, and that its reference to “rules of the Supreme Court” envisioned rules specifying the calculation of “seniority in service.” Significantly, this interpretation is in accord with the original Rules of Court promulgated under the New Jersey Constitution of 1947. The relevant rule provided:

## Quorum

Five members of the court shall constitute a quorum. If a quorum does not attend a session of the court, the senior justice attending may adjourn the court, or, in the absence of all the justices, the clerk may adjourn the court from day to day. When necessary to make a quorum the presiding justice shall assign the senior judge or judges of the Superior Court to serve temporarily. Seniority shall be determined by the order of their appointment to the Superior Court (except that as to judges who have been serving as justices of the old Supreme Court, vice chancellors, circuit court judges, and judges of the Court of Errors and Appeals specially appointed, seniority shall be determined in the order of their original appointments).<sup>63</sup>

Arthur Vanderbilt was the Chief Justice when these original rules were promulgated by the New Jersey Supreme Court. Vanderbilt was appointed a circuit judge under the old constitution not long after the new constitution was approved at the November 1947 election, thereby making him eligible to become the first Chief Justice under the 1947 Constitution when the Judiciary Article took effect in September of 1948 and enabling him “to devote full time to preparation for the new regime of courts and rules.”<sup>64</sup> The original rules were “produced under Vanderbilt’s close management.”<sup>65</sup>

Although Vanderbilt did not attend the Constitutional Convention, he personally selected the delegates from Essex County, was in constant touch with them, and even received a tape of every

---

<sup>63</sup> N.J. R. 1:1-3 (1948); see also *Preliminary Draft of the Court Rules*, 71 N.J. L.J. 101 (March 18, 1948) (same).

<sup>64</sup> *Conversations with Morris Schnitzer*, 47 RUTGERS L. REV. 1391, 1397 (1995) [hereinafter *Conversations*].

<sup>65</sup> *Id.*

session of the Judiciary Committee by courier.<sup>66</sup> Evidently a man who did not blush easily when asserting power he thought desirable, he wrote the court's opinion in *Winberry*, even though he had written to the Judiciary Committee arguing that the words "subject to law" should be deleted from the tentative draft because they made the court's rulemaking power "subject to legislative control."<sup>67</sup> Yet even Arthur Vanderbilt did not claim that he had the power to temporarily assign judges to the Supreme Court, except to make a quorum.

Indeed, on its very first day of issuing decisions, October 4, 1948, the new Supreme Court decided several cases with a bare quorum of five.<sup>68</sup> It did not take long before the new Supreme Court faced its first equal division. On January 3, 1949, less than three months after the effective date of the new Judiciary Article, *Vanagas v. Vanagas*<sup>69</sup> was argued. Six justices participated, with Justice Oliphant recused, evidently because the appeal was from the former Court of Chancery and he was the former Chancellor. The six justices divided equally, with three for affirmance and three for reversal. In accordance with the traditional practice described above, the court affirmed.<sup>70</sup>

Thus within its first months, the new Supreme Court promulgated a rule that temporary assignments to the Supreme Court would be made when necessary to make the quorum, decided cases with the bare quorum of five, and decided cases with six justices, even where those six were evenly divided.

In 1953, while Vanderbilt was still Chief Justice, the original rules were revised. As revised, the relevant rule provided:

Quorum

Five members of the court shall constitute a quorum. If a quorum

---

<sup>66</sup> *Id.* at 1394-95.

<sup>67</sup> *Letter from Arthur T. Vanderbilt to the Committee on the Judiciary*, in 4 N.J. CONST. CONV. 729 (July 29, 1947); see also *Conversations*, *supra* note 64 at 1399 (recounting a conversation in which Justice Wachenfeld had bellowed with laughter and said, "If I had written that letter I would not have published the *Winberry* opinion."); cf. Stewart G. Pollock, *Foreward: Celebrating Fifty Years of Judicial Reform Under the 1947 New Jersey Constitution*, 29 RUTGERS L.J. 675, 685 (1998) (quoting Governor Meyner's description of Vanderbilt's opinion in *Winberry* as "the greatest display of intellectual dishonesty I have ever seen"); *id.* (asserting that judges "often must choose between a commitment to principled analysis and the right result" and that Vanderbilt "correctly perceived that the end . . . justified the means").

<sup>68</sup> *State v. Ct. of Common Pleas*, 1 N.J. 14, 61 A.2d 503 (1948); *Ring v. Mayor of North Arlington*, 1 N.J. 24, 61 A.2d 508 (1948); *Nussbaum v. Hetzer*, 1 N.J. 25, 61 A.2d 508 (1948); *Grummisch v. Barney Constr. Co.*, 1 N.J. 30, 61 A.2d 570 (1948). That same day, it also decided a case with six justices. *Bosze v. Metro. Life Ins. Co.*, 1 N.J. 5, 61 A.2d 499 (1948).

<sup>69</sup> 1 N.J. 335, 63 A.2d 531 (1949).

<sup>70</sup> *Id.* at 336, 63 A.2d at 531.



does not attend a session of the court, the presiding justice may adjourn the court, or, in the absence of all the justices, the clerk may adjourn the court from day to day. When necessary the presiding justice shall assign the senior judge or judges of the Superior Court to serve temporarily. Seniority shall be determined by the order of their appointment to the Superior Court (except that as to judges who have been serving as justices of the old Supreme Court, vice chancellors, circuit court judges, and judges of the Court of Errors and Appeals specially appointed, seniority shall be determined in the order of their original appointments).<sup>71</sup>

Notice that the revised rule, in an echo of the proceedings in the Judiciary Committee of the Constitutional Convention, shortened “when necessary to make a quorum” to “when necessary.” In this context it is even clearer that the change was stylistic, because the entire provision (and its heading) dealt with the quorum requirement, and the other change made was to shorten “senior justice attending” to “presiding justice.” Moreover, less than two weeks after the revised rule took effect, the Supreme Court heard argument in a case with six justices; they divided equally and the judgment was accordingly affirmed.<sup>72</sup> Later that term, the Court decided cases with the bare quorum of five.<sup>73</sup> Thus, not only are both the original and the revised Supreme Court rule consistent with interpreting the temporary assignment provision of the constitution as available only when necessary to make a quorum, but the very change made to the original rule by the revised rule confirms the appropriateness of treating the identical change made by the Judiciary Committee of the convention as stylistic.

## V

### THE UNCONSTITUTIONAL EXPANSION AND ALTERATION OF THE ASSIGNMENT POWER IN 1967 AND 1978

As late as September of 1967, the Court continued to decide cases with five justices.<sup>74</sup> On September 25, 1967, however, Chief Justice Weintraub assigned Judge Sidney Goldmann to serve in the

---

<sup>71</sup> N.J. REV. R. 1:1-5 (Gann 1953).

<sup>72</sup> *Seiler v. Robinson*, 13 N.J. 307, 99 A.2d 422 (1953). The case was argued by Robert A. Vanderbilt, and Chief Justice Vanderbilt did not participate. *Id.* at 308, 99 A.2d at 422.

<sup>73</sup> *Kagan v. Berman*, 14 N.J. 467, 102 A.2d 765 (1954); *Beirn v. Morris*, 14 N.J. 529, 103 A.2d 361 (1954).

<sup>74</sup> *See, e.g., Booth v. Bd. of Adjustment*, 50 N.J. 302, 234 A.2d 681 (1967).

absence of Justice Frederick Hall from September 26, 1967, until January 8, 1968.<sup>75</sup> The next day, the court promulgated an amendment to its rules and Judge Goldmann began to sit with the court.<sup>76</sup> The amendment revised the “when necessary” sentence to read:

When necessary to constitute a quorum, to replace a justice who is absent or unable to act, or to expedite the business of the court, the presiding justice may assign the judge or judges of the Appellate Division, senior in length of service therein, to serve temporarily in the Supreme Court. If the judge senior in service is unable to serve or shall waive assignment, the presiding justice may assign the judge next senior in service; and if one or more have equal seniority, the presiding justice may assign either or any of them.<sup>77</sup>

Since this amendment, the assignment practice has been erratic. Indeed, it can fairly be described as lawless. At times, judges have been assigned indefinitely to fill vacancies caused by retirement until a successor is appointed.<sup>78</sup> In other instances, temporary assignments

---

<sup>75</sup> *Assignment Order*, 90 N.J. L.J. 633 (order dated Sept. 25, 1967, published Sept. 28, 1967); 50 N.J. vii (1967). Judge Goldmann was “a legend among judges,” as well as “one of the drafters of the constitutional articles.” Daniel J. O’Hern, *The New Jersey Constitution: A Charter To Be Cherished*, 7 SETON HALL CONST. L.J. 827, 828 (1997).

<sup>76</sup> In his first opinion, he issued a solo dissent from a five-justice majority decision. *Loeb v. Loeb*, 50 N.J. 343, 235 A.2d 20 (1967) (Goldmann, J., dissenting).

<sup>77</sup> *Rule Amendment*, 90 N.J. L.J. 649 (order dated Sept. 26, 1967, published Oct. 5, 1967). Morris M. Schnitzer & Julius Wildstein, New Jersey Rules Service, Rule 1:1-5 (1958 ed., Oct. 5, 1967 update) (with title “Quorum; Temporary Assignments”). The current version of the rule is N.J. R. 2:13-2(a).

<sup>78</sup> *See, e.g.*, 61 N.J. vii (1972) (reporting Judges Milton Conford and Mark Sullivan “temporarily assigned to fill the vacancies caused by the retirement of Justice Francis and Justice Schettino, September 11, 1972, until further order”); 73 N.J. vii (1977) (temporary assignment of Judge Conford terminated upon appointment of Justice Handler, except to permit him to participate in disposition of matters presented during his temporary assignment). No such general assignment appears in New Jersey Reports or the New Jersey Law Journal for the period between Justice Stein’s retirement on September 1, 2002, and Justice Albin taking office on September 18, 2002, *see* 173 N.J. vii (2002), although Judge Pressler was assigned for some cases argued during this period. *See State v. Mendez*, 175 N.J. 201, 814 A.2d 1043 (2002); *McQueen v. Brown*, 175 N.J. 200, 814 A.2d 1042 (2002); *In re Estate of Roccamonte*, 174 N.J. 381, 808 A.2d 838 (2002); *State v. Rue*, 175 N.J. 1, 811 A.2d 425 (2002); *McCurrie v. Town of Kearny*, 174 N.J. 523, 809 A.2d 789 (2002); *Shaw v. City of Jersey City*, 174 N.J. 567, 811 A.2d 404 (2002); *State v. Darby*, 174 N.J. 509, 809 A.2d 138 (2002).

No cases were argued between May 4, 2003, when Justice Coleman retired, and May 20, 2003, when Justice Wallace took office. *See Supreme Court Agenda, Court Year 2002-03*, available at <http://www.judiciary.state.nj.us/calendars/fphist02.htm> (visited July 24, 2003) (indicating April 29, 2003, as the last day of argument); 175 N.J. vii (indicating the dates of retirement and taking office).

are not made to fill such vacancies, even if that means cases are decided by the bare quorum of five.<sup>79</sup> Of course, the result of not making temporary assignments to fill vacancies can be an affirmance by an equally divided court.<sup>80</sup> Nor is there any discernable pattern to when temporary assignments will be made in other situations, such as recusals.<sup>81</sup> This confusion is attributable to the rule's departure from

---

<sup>79</sup> See, e.g., 91 N.J. vii (1982) (noting retirement of Justice Pashman in September and appointment of Justice Garibaldi in November of 1982); *In re* 1982 County of Hudson Judicial Budget Impasse, 91 N.J. 412, 452 A.2d 202 (1982) (decided by six justices); *In re* Corrigan, 91 N.J. 421, 452 A.2d 206 (1982) (decided by six justices); *State v. State Troopers Fraternal Ass'n*, 91 N.J. 464, 453 A.2d 176 (1982) (decided by five justices). Sometimes the problem of a vacancy caused by retirement is avoided by the incoming justice taking office on the same day that the outgoing justice retires. See 159 N.J. vii (1999) (noting retirement of Justices Handler and Pollack on same day Justices Long and Verniero took office); 162 N.J. vii (2000) (noting retirement of Justice Garibaldi on same day Justice LaVecchia took office).

<sup>80</sup> See 97 N.J. vii (1984) (noting retirement of Justice Schreiber in November of 1984); 98 N.J. vii (1985) (noting appointment of Justice Stein in January 1985); *Merker v. Div. of Med. Assistance & Health Servs.*, 98 N.J. 62, 484 A.2d 322 (1984) (affirming judgment of Appellate Division by an equally divided court).

<sup>81</sup> See, e.g., *Lockley v. State*, 177 N.J. 413, 828 A.2d 869 (2003) (Justice Zazzali not participating and not replaced, resulting in six to zero decision, with three of the six justices joining a separate concurring opinion); *Sojourner A. v. N.J. Dep't of Human Servs.*, 177 N.J. 318, 828 A.2d 306 (2003) (Justices Verniero and LaVecchia replaced by Judges Havey and Kestin, resulting in a seven to zero decision); *Jump v. City of Ventor*, 177 N.J. 470, 828 A.2d 905 (2003) (Justice Albin not participating and not replaced, resulting in a four to two decision); *McNeil v. Legislative Apportionment Comm'n*, 177 N.J. 364, 828 A.2d 840 (2003) (Chief Justice Poritz replaced by Judge Pressler, resulting in a four to three decision); *Abbott v. Burke*, 2003 WL 21700375 (N.J. July 23, 2003) (Justices Verniero and Zazzali not participating and not replaced, resulting in a four to one decision); *Abbott v. Burke*, 2003 WL 21456277 (N.J. June 24, 2003) (Justices Verniero and Zazzali not participating and not replaced, resulting in a five to zero decision); *Tomeo v. Thomas Whitesell Constr. Co.*, 176 N.J. 366, 823 A.2d 769 (2003) (Justice Long not participating and not replaced, resulting in a four to two decision); *State v. Holland*, 176 N.J. 344, 823 A.2d 38 (2003) (Justice Albin not participating and not replaced, resulting in a six to zero decision); *A.B. v. S.E.W.*, 175 N.J. 588, 818 A.2d 1270 (2003) (Justices Long and Albin replaced by Judges Petrella and Skillman, resulting in a seven to zero decision); *Van Note-Harvey Assocs. v. Township of East Hanover*, 175 N.J. 535, 816 A.2d 1041 (2003) (Chief Justice Poritz not participating and not replaced, resulting in a six to zero decision); *McNeil v. Legislative Apportionment Comm'n of New Jersey*, 176 N.J. 484, 825 A.2d 1124 (2003) (Chief Justice Poritz not participating and replaced by Judge Pressler, resulting in a six to one decision granting a stay pending appeal); *Watson v. City of East Orange*, 175 N.J. 442, 815 A.2d 956 (2003) (Judge King assigned, resulting in a four to three decision); *Azurak v. Corp. Prop. Investors*, 175 N.J. 110, 814 A.2d 600 (2003) (Chief Justice Poritz and Justice Verniero not participating and not replaced, resulting in a five to zero decision); *Nisivoccia v. Glass Gardens, Inc.*, 175 N.J. 559, 818 A.2d 314 (2003) (Justice Verniero not participating and not replaced, resulting in a six to zero decision); *State v. S.R.*, 175 N.J. 23, 811 A.2d 439 (2002) (Chief Justice Poritz and Justice Verniero not participating and not replaced, resulting in a five to zero decision); *State v. Brooks*, 175 N.J. 215, 814 A.2d 1051 (2002) (Justice Long not participating and not replaced, resulting in a five to one decision); *Mortara v. Cigna*

the constitution. And it departs in several respects.

First, it purports to authorize the temporary assignment of judges to the Supreme Court even when not necessary to constitute a quorum. Indeed, by providing for a temporary assignment “to

---

Prop. & Cas. Ins. Co., 174 N.J. 566, 811 A.2d 404 (2002) (Justice Stein not participating and not replaced, resulting in a six to zero decision); *Matturi v. Bd. of Trs. of the Judicial Ret. Sys.*, 173 N.J. 368, 802 A.2d 496 (2002) (Justice LaVecchia not participating and not replaced, resulting in a five to one decision); *In re Breslin*, 171 N.J. 235, 793 A.2d 645 (2002) (Judge King assigned, resulting in four to three decision censuring, rather than disbaring, attorney); *State v. Carty*, 170 N.J. 632, 790 A.2d 903 (2002) (Justices Verniero and LaVecchia not participating and not replaced resulting in a five to zero decision, with one of the five, Justice Stein, separately concurring in the judgment); *State v. Stovall*, 170 N.J. 347, 788 A.2d 746 (2002) (racial profiling case decided by a vote of three to two, with Justices Long and Verniero not participating and not replaced); *Bd. of Educ. v. Bd. of Educ.*, 170 N.J. 323, 788 A.2d 729 (2002) (Justice Long not participating and not replaced, resulting in a six to zero decision, with two of the six, Justices Stein and LaVecchia, each writing separate concurring opinions); *Wright v. State*, 169 N.J. 422, 778 A.2d 443 (2001) (Judges Pressler and Skillman assigned, bringing court to quorum of five); *In re Registrant J.G.*, 169 N.J. 304, 777 A.2d 891 (2001) (Judges Carchman and Wells assigned, bringing court to seven and resulting in five to two decision); *In re Registrant M.F.*, 169 N.J. 45, 776 A.2d 780 (2001) (Judge Wells assigned, bringing court to five and resulting in unanimous decision); *Manzie*, 168 N.J. 113, 773 A.2d 659 (no judge assigned, resulting in three to three affirmance); *State v. Maryland*, 167 N.J. 471, 771 A.2d 1220 (2001) (Judge Pressler assigned, bringing court to five and resulting in unanimous decision); *Trantino v. N.J. State Parole Bd.*, 166 N.J. 113, 764 A.2d 940 (2001) (Judges Havey and Baime assigned, bringing court to five and resulting in four to one decision); *In re Passaic County Utils.*, 164 N.J. 270, 753 A.2d 661 (2000) (Judge Pressler assigned, bringing court to seven and resulting in four to three decision); *Manasquan River Reg'l Sewage Auth. v. Ocean County Utils. Auth.*, 117 N.J. 239, 566 A.2d 186 (1989) (no judge assigned, resulting in three to three affirmance).

In one recent case, Justices Zazzali and Albin did not participate and were not replaced by any Superior Court judges. *In re Niles*, 176 N.J. 282, 823 A.2d 1 (2003). The result was a three to two decision reversing the judgment of the Appellate Division. *Id.* Strikingly, Justice Coleman was one of the five constituting a quorum (and one of the three in the majority), even though the case was decided on May 28, 2003, and he had retired on May 4, 2003. See 175 N.J. vii (2003). Justice Wallace, who took office on May 20, *id.*, did not participate, apparently because the case had been argued on March 17, 2003. See *Niles*, 176 N.J. 282, 823 A.2d 1; see also *infra* text accompanying notes 95-99 (discussing and critiquing the 1978 rule amendment providing for assignment of retired justices); *infra* Part VI (arguing that it is unconstitutional for a judge or justice who has reached the mandatory retirement age to exercise judicial power).

Chief Justice Wilentz was reported to have stated in 1984 that temporary assignments for single-case vacancies were required only when necessary for a quorum and were made in other cases depending “upon whether there is a significant split on the court or whether the case is of such overwhelming general importance that it should not be considered by a truncated Court.” Barnett & Rubinfeld, *supra* note 23, at 1192 n.11. Even assuming that this accurately described the practice in 1984, it is difficult to maintain that the foregoing cases are consistent with that standard.

expedite the business of the court," it would even appear to authorize the temporary appointment of judges when all seven are available, thus temporarily expanding the size of the court. If this seems like a wild-eyed idea, bear in mind that Arthur Vanderbilt had specifically urged the Judiciary Committee of the Convention to do just that:

There is a serious omission in the tentative draft in failing to provide for the relief of litigants when the appellate courts, either by reason of pressure of business or otherwise, do not hand down decisions within a reasonable time. Various devices have been suggested, such as withholding salaries when opinions are not handed down sixty days after argument, etc., but the most effective method of obtaining prompt judgment is to provide that the Governor or the Chief Justice shall convene a special term of the Appellate Division or of the Supreme Court from among the judges of the General Court whenever the work of the appellate court is more than sixty days in arrears.<sup>82</sup>

In addition, under a practice of the Supreme Court of New Jersey that dates to 1971, justices have participated in decisions rendered after their retirement and the appointment of a successor in office. In *Williams v. Williams*,<sup>83</sup> Justice Haneman participated in a five to zero decision after his replacement, Justice Mountain, had taken office. Similarly, in *DiOrio v. New Jersey Manufacturers Ins. Co.*,<sup>84</sup> Justice Proctor and Chief Justice Weintraub participated after their replacements, Justice Pashman and Chief Justice Garvin, had taken office. Indeed, by the time the case was decided, with Chief Justice Weintraub delivering the majority opinion, his successor had already died.<sup>85</sup> In accordance with this practice, Justice Coleman has

---

<sup>82</sup> Letter from Arthur T. Vanderbilt to the Committee on the Judiciary, in 4 N.J. CONST. CONV. 729, 731 (July 29, 1947); see also 4 N.J. CONST. CONV. 346-48 (1947) (discussing the advantages and disadvantages of such a proposal, and noting that it had been included in the draft 1942 constitution).

<sup>83</sup> 59 N.J. 229, 281 A.2d 273 (1971).

<sup>84</sup> 63 N.J. 597, 311 A.2d 378 (1973).

<sup>85</sup> See NEW JERSEY LEGISLATIVE MANUAL 530 (2003) (reporting Chief Justice Garvin's appointment on September 1, 1973 and his death in office on October 19, 1973); see also, e.g., *Anderson v. Somberg*, 67 N.J. 291, 338 A.2d 1 (1975) (Justice Jacobs participating after his replacement by Justice Schreiber); *N.J. State Chamber of Commerce v. N.J. Election Law Enforcement Comm'n*, 82 N.J. 57, 411 A.2d 168 (1980) (Chief Justice Hughes and Justice Mountain participating after their replacement by Chief Justice Wilentz and Justice Pollack); *Van Horn v. Wm. Blanchard Co.*, 88 N.J. 91, 438 A.2d 552 (1981) (Justice Sullivan participating after his replacement by Justice O'Hern); *Mahoney v. Mahoney*, 91 N.J. 488, 453 A.2d 527 (1982) (Justice Pashman participating after his replacement by Justice Garibaldi); *Hovbilt v. Town of Howell*, 138 N.J. 598, 651 A.2d 77 (1994) (Justice Clifford participating after his replacement by Justice Coleman); *Cox v. RKA Corp.*, 164 N.J. 487, 753 A.2d 1112 (2000) (Justice Garibaldi participating after her replacement by

participated in decisions rendered after his retirement and the appointment of his successor, Justice Wallace.<sup>86</sup> Whatever the basis for this dubious practice,<sup>87</sup> it would appear that during the several

---

Justice LaVecchia); *Township of Middletown v. Middletown PBA Local 124*, 166 N.J. 112, 764 A.2d 940 (2000) (Justice O'Hern participating after his replacement by Justice Zazzali). It might be thought that one of the original justices of the new Supreme Court engaged in this practice as well, since Justice Ackerson's last decision was rendered on January 28, 1952, and the New Jersey Legislative Manual states that he retired on January 20, 1952. NEW JERSEY LEGISLATIVE MANUAL 530 (2003). New Jersey Reports, however, states that he retired on January 29, 1952. 8 N.J. vii (1952). This later source is both more authoritative, and consistent with other facts. Justice Ackerson had been confirmed to another seven year term as circuit court judge on January 22, 1945, New Jersey Senate Journal 929-31 (1945), and therefore could serve in the reconstituted judiciary until the expiration of that term. N.J. CONST. art. XI, § 4, ¶ 1. Seven year terms for circuit judges ran from the date of their commissions, *see* NEW JERSEY SESSION LAWS OF 1900, at 349, 358, chap. 149, § 39; *see also* N.J. CONST. art. VII, § 1, ¶ 5 (1947), and it is highly unlikely that Judge Ackerson's 1945 commission would have been dated on the same day as his confirmation, and obviously would not have been dated two days earlier. *See also* NEW JERSEY SENATE JOURNAL 1111-12 (1938) (Judge Ackerman confirmed for another seven year term as circuit judge on January 24, 1938). Indeed, Judge Ackerman's initial nomination as a circuit court judge was confirmed on January 28, 1924, NEW JERSEY SENATE JOURNAL 574-75 (1924), making it highly unlikely that any of his commissions bore a date earlier than January 28.

<sup>86</sup> For decisions prior to the appointment of Justice Wallace, *see, e.g.*, *Boston Univ. v. UMDNJ*, 176 N.J. 141, 820 A.2d 1230 (2003); *D.D.B. Interior Contracting Inc. v. Trends Urban Renewal Ass'n*, 176 N.J. 164, 821 A.2d 1135 (2003); *State v. Tyler*, 176 N.J. 171, 821 A.2d 1139 (2003). For decisions after Justice Wallace took office, *see, e.g.*, *Jump v. City of Ventnor*, 177 N.J. 470, 828 A.2d 905 (2003); *Lockley v. New Jersey*, 177 N.J. 413, 828 A.2d 869 (2003); *McNeil v. Legislative Apportionment Comm'n*, 177 N.J. 364, 828 A.2d 840 (2003); *State v. Garron*, 177 N.J. 147, 827 A.2d 243 (2003); *State v. Sisler*, 177 N.J. 199, 827 A.2d 274 (2003); *Brunell v. Wildwood Crest Police Dep't*, 176 N.J. 225, 822 A.2d 576 (2003); *Mull v. Zeta Consumer Prods.*, 176 N.J. 385, 823 A.2d 782 (2003); *State v. Pelham*, 176 N.J. 448, 824 A.2d 1082 (2003).

<sup>87</sup> There are three grounds on which the practice might be defended. First, it might be viewed as an application of the temporary assignment rule, N.J. R. 2:13-2(a), treating the retired justice as recalled and temporarily assigned. The practice, however, predates the 1978 rule amendment providing for the recall of retired justices. *See infra* text accompanying notes 95-99. Moreover, the decisions do not purport to invoke this rule or describe the retired justice as recalled.

Second, it might be argued that these cases were actually decided when the justices voted in conference, making the date of the vote in conference the relevant date. *See United States v. American-Foreign S.S. Corp.*, 363 U.S. 685, 694 (1960) (Harlan, J., dissenting) (stating that the "exact point of time when a case is 'determined'" varies from case to case and is known "only to the judges themselves," and arguing that if "all argument, reflection, deliberation, and explication" have been completed and an opinion filed with the clerk the morning after the retirement of a judge, that judge's vote should be counted). On this view, so long as the conference vote took place before the justice retired, it would be proper to count his or her vote.

The federal courts have rejected this approach, and for good reason. The majority in *American-Foreign Steamship* treated the date on which the decision was issued as the relevant date in determining the court's legitimate membership. *Id.* at

686, 688-91 (holding, under then-existing statutes that limited in banc decisions to active judges, that a judge who retired from active service after the case had been submitted to the in banc court but before the decision was issued, could not participate in the in banc decision). Conference votes are inherently tentative; a vote does not become effective until the decision is filed or announced. *See United States v. Banmiller*, 310 F.2d 720, 736 (3d Cir. 1962) (in banc) (holding that the vote of a judge who participated at conference but died before the opinion was filed could not be counted); *Mayor of Baltimore v. Mathews*, 562 F.2d 914 (4th Cir. 1977) (in banc) (counting the vote of a judge who had “concurred in the judgment and approved the language of Parts I and II of the majority opinion” but “died before the filing of the opinions”), *withdrawn on reh’g*, 571 F.2d 1273, 1276 (4th Cir. 1978) (holding that the deceased judge’s approval of the draft opinion “cannot be tallied for the purpose of deciding the appeal”); *Cramer v. Fahner*, 683 F.2d 1376, 1378 n.\* (7th Cir. 1982) (noting that a judge who had heard the oral argument, voted to affirm, and concurred in a suggested opinion but died prior to reviewing the partial dissent, was “succeeded on the panel” by another judge); *see also* Terri Jennings Peretti, IN DEFENSE OF A POLITICAL COURT 110 & 289 n.229 (1999) (noting studies of various periods in the Supreme Court of the United States showing that approximately 14% of the time the initial vote of a justice differed from his ultimate vote).

It is sometimes said that the Supreme Court of the United States counted Justice Grier’s vote in *Hepburn v. Griswold*, 75 U.S. 603 (1870), even though he had retired effective January 31, 1870, and the opinion was announced on February 7, 1870. *See, e.g.*, PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 235 (4th ed. 2000) (asking whether “we would today count the vote of a justice in similar circumstances”); David J. Garrow, *Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28<sup>th</sup> Amendment*, 67 U. CHI. L. REV. 995 (2000) (stating that “Chief Justice Chase was intensely committed to using Grier’s vote to support a majority decision” despite “Grier’s demonstration of mental incapacity during the conference discussion”); *Knox v. Lee*, 79 U.S. 457, 572 (1871) (Chase, C.J., dissenting) (describing *Hepburn* as decided by a vote of five to three). In *Hepburn*, the opinion of the court recited, “It is proper to state the Mr. Justice Grier, who was a member of the court when the case was decided in conference, and when this opinion was directed to be read . . . concurred in the opinion” that the legal tender clause, as construed by the other judges, was unconstitutional. *Id.* at 626. This can plausibly be read as simply a notation of Justice Grier’s views, even though his vote did not count. *Cf., e.g.*, *Mayor of New York v. Miln*, 36 U.S. 102 (1837) (Story, J., dissenting) (noting that “the late Mr. Chief Justice Marshall” had heard the arguments in the case at an earlier term and that “his deliberate opinion” coincided with Justice Story’s); *United States v. Turner*, 130 F.3d 815, 816 n.1 (8th Cir. 1997) (noting that a judge had died after oral argument and that the opinion “is consistent with his vote at the panel’s conference”). If Grier is not counted, there were seven participating justices, and the decision was four to three. Thus Grier’s vote was not necessary to make the Chief Justice’s opinion an opinion of the Court. Moreover, the paragraph about Justice Grier’s views comes at the very end of the opinion, after the paragraph concluding that the judgment under review must be affirmed. Thus there is reason to doubt, despite the protestations of Chief Justice Chase when *Hepburn* was overruled, that Justice Grier’s vote did count in *Hepburn*. *See* CHARLES FAIRMAN, 6 THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES 677 (1971) (describing *Hepburn* as decided by Chief Justice Chase, joined by Justices Nelson, Clifford, and Field, over the dissent of Justices Miller, Swayne, and Davis); BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 157 (1993) (stating that when *Hepburn* was decided, the “Supreme Court consisted of only seven members”); ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 42 (1941) (stating that “[b]efore the decision was announced, Grier resigned, and the

months in which the retired justice and his or her successor in office are *both* rendering decisions,<sup>88</sup> there are more than seven justices of

---

score was announced 4 to 3"); *cf.* *Finishing Inc. v. Di-Chem*, 419 U.S. 601, 617 (1975) (Blackmun, J., dissenting) (describing *Hepburn* as "assertedly" decided by a five to three vote). Even if *Hepburn* is read as supporting the counting of a vote when the judge retires before the decision is announced, it simultaneously illustrates the danger of such a practice. *Hepburn* was overruled a year later, and the entire episode is regarded as "ignominious and embarrassing." Garrow, *supra*, at 1005; *see also Di-Chem*, 419 U.S. at 618 (describing *Hepburn* as producing "prompt reversal of opinion, embarrassment, and recrimination").

Yet even if one were inclined to think that the federal courts were wrong to reject this approach, the practice of the New Jersey Supreme Court is inconsistent with viewing the case as decided on the date of the conference vote, with the retired justice taking no action after that date. As a formal matter, the decisions on their face explicitly state the date on which the case was "decided," without any notation regarding a conference vote. In addition, it can hardly be said that a retired justice's participation ended with the vote at conference if he or she later delivers the opinion of the court. Indeed, a justice has participated in the rehearing of a case after his retirement and the appointment of a successor. *McGlynn v. N.J. Pub. Broadcasting Auth.*, 88 N.J. 112, 439 A.2d 54 (1981); *see also N.J. State Chamber of Commerce*, 82 N.J. at 108, 411 A.2d at 193 (motion seeking an extension of time to implement the judgment apparently considered by justices who were on the court when the case was argued, even though their successors were on the court when the motion was made).

Thus the New Jersey Supreme Court's practice must be rooted in the third and final ground: so long as a judge is on the court when the case is argued and submitted, he or she can participate in the decision (even on rehearing). What other office works this way? Could a governor issue a pardons after his term has expired, simply because he was already considering the pardon application beforehand? Could a legislator vote for a bill after his term has expired simply because he introduced it and shepherded it through committee? Could a justice whose initial seven year term expired, but was not reappointed, continue to decide cases? Note that the Supreme Court of New Jersey, unlike the Supreme Court of the United States since the Judiciary Act of 1925, does not have a practice of deciding all argued cases before the end of a term or setting them for reargument the following term. More than a year can elapse between the date of argument and the date of decision. For example, in *State v. Marshall*, 148 N.J. 89, 690 A.2d 1 (1997), the New Jersey Supreme Court heard argument on January 16, 1996, but did not decide the case until March 5, 1997. In *State v. Loftin*, 157 N.J. 253, 724 A.2d 129 (1999), it heard argument on March 18, 1997, and decided the case nearly two years later on February 1, 1999. *See also, e.g., State v. Papasavvas*, 170 N.J. 462, 790 A.2d 798 (argued Oct. 24, 2000, decided Feb. 14, 2002). As a result, to allow a retired justice of the New Jersey Supreme Court to participate in a decision simply because he or she was on the court when the case was argued or submitted would empower that justice to participate in a decision years after retirement with no outside time limit at all.

The Supreme Court of New Jersey should reconsider the practice of retired justices continuing to participate in decisions. Note that the New Jersey Senate may well be able to force a rejection of this practice by refusing to confirm a new justice without assurance that the replaced justice will cease (or has already ceased) exercising the power of his or her office.

<sup>88</sup> For example, Justice Wallace began participating in decisions no later than June 24, 2003. *Abott ex rel. Abott v. Burke*, 2003 WL 21456277 (N.J. Jun 24, 2003) (five justices participating, including Justice Wallace but not Justice Coleman); *In re Piscal*, 2003 WL 21480694 (June 27, 2003) (seven justices participating, including



the New Jersey Supreme Court.

Second, the rule speaks in permissive terms—"may assign"—while the constitution plainly speaks in mandatory terms—"shall assign." These two departures from the constitution are related: As we have seen, the mandatory nature of the constitutional provision is one reason to interpret it as limiting the circumstances in which temporary assignments can be made to those in which the court would otherwise lack a quorum. Indeed, the circumstances in which the rule purports to authorize a temporary assignment could not sensibly be the predicates for a mandatory requirement. If the temporary assignment of a judge "to replace a justice who is absent or unable to act" were mandatory, there would be no room whatsoever for the operation of the provision for temporary assignment to make a quorum. In addition, the only significance of a mandatory provision for temporary assignment "to expedite the business of the court" would be to require, in some instances, the expansion of the court beyond seven members. In light of the incongruity of making temporary assignments mandatory in the circumstances added by the amended rule, it is hardly surprising that the rule, unlike the constitution, is stated in permissive terms.

Finally, the rule departs from the constitution's designation of the judge to be assigned. The constitution requires that the "Judge or Judges of the Superior Court, senior in service" be assigned, leaving to the Supreme Court, by rule, to provide for the determination of "seniority in service." The rule simply ignores the constitution's designation and substitutes instead the "judge or judges of the Appellate Division, senior in length of service therein." While "seniority" can mean position in a hierarchy, so that any judge of the Appellate Division can be understood as "senior" to a trial level judge in that hierarchical sense, "senior in service" is plainly a

---

Justice Wallace, but not Justice Coleman); *see also, e.g., In re Milita*, 177 N.J. 1, 826 A.2d 673 (July 9, 2003) (seven justices participating, including Justice Wallace, but not Justice Coleman); *Abbott v. Burke*, 2003 N.J. Lexis 668 (July 23, 2003) (five justices participating, including Justice Wallace, but not Justice Coleman). Justice Coleman has participated in decisions as late as August 13, 2003, *see Jumpp v. City of Ventnor*, 177 N.J. 470, 828 A.2d 905 (2003), and is expected to participate in at least one other still to come. *See* [www.judiciary.state.nj.us/calendars/sc\\_appeal.htm](http://www.judiciary.state.nj.us/calendars/sc_appeal.htm) (listing *State v. Fortin*, A-31-01, as argued on Oct. 22, 2002, but not yet decided) (visited on Nov. 3, 2003); *see also* Kathy Barrett Carter, *Death Penalty Prominent of Justice's Docket: Newest Member Could Determine Direction of Court in Poritz's Final Three Years*, STAR-LEDGER (Newark, N.J.) Sept. 8, 2003, at 13 (stating that Justice Wallace would not have an impact on "the most eagerly awaited capital punishment decision," referring to *Fortin*).

reference to time.<sup>89</sup> Indeed, the rule itself reflects this understanding, by providing that the judge to be assigned is the Appellate Division judge “senior in length of service therein.”

Reflecting back nearly fifty years after the convention, Morris Schnitzer explained:

Every member of the Judiciary Committee had been sensitized to political influence on the courts, made memorable by Mayor Hague’s public proclamation: “I am the law.” Politically critical cases would inevitably come before the supreme court. Unbridled discretion in choosing a lower court judge to fill an ad hoc vacancy was certain to diminish respect for the supreme court. The Judiciary Committee aimed to make the choice automatic, and immune from discretion, by specifying seniority in service on the superior court as the criterion. Once the supreme court began to function, it recoiled from automatic substitutions of trial judges of a quality deemed below the task. Taking some license, New Jersey Court Rule 2-13-2 [as now numbered] shifted the choice to the appellate division judges “senior in length of

---

<sup>89</sup> Judge Sylvia Pressler is the “judge . . . of the Appellate Division, senior in length of service therein.” There are at least three other judges, however, who are “Judges of the Superior Court, senior in service” to Judge Pressler. Judge Michael King took office on the Superior Court in 1975, and Judge James Petrella took office on the Superior Court in February of 1976, while Judge Pressler did not take office on the Superior Court until October of 1976. Perhaps surprisingly, Judge Robert Longhi is “senior in service” on the Superior Court to both Judge Pressler and Judge Petrella, even though he took office on the Superior Court in December of 1978. Judge Longhi was a judge of the County Court when, by operation of the 1978 constitutional amendment abolishing the County Courts, the judges of the County Courts became judges of the Superior Court. The amendment specifically provides that such judges hold office “with all rights, and subject to all the provisions of the Constitution affecting a judge of the Superior Court as though he were initially appointed to the Superior Court.” N.J. CONST. art. 11, § 6 (as amended in 1978). Thus the date that counts for Judge Longhi’s seniority on the Superior Court is January of 1976, when he took office as a judge of the County Court. For the same reason, Judge Kenneth Mackenzie is not far behind, having taken office as a judge of the County Court in February of 1977. Although Judges Pressler and Petrella themselves had been judges of the County Court from 1973 until 1976, they did not become Superior Court Judges by operation of the 1978 constitutional amendment, and its provisions do not apply to them. Note also that, while the judges of the juvenile and domestic relations courts and the county district courts became judges of the Superior Court by operation of the 1983 constitutional amendment upon the abolition of those courts, *see id.* at § 6, ¶ 1 (as amended in 1983), there was no parallel provision in the 1983 constitutional amendment treating such a judge “as though he were initially appointed to the Superior Court.” *See id.* at § 6, ¶ 3 (as amended in 1983). I thank David Anderson of the Administrative Office of the Court for providing most of these factual details by telephone on April 9, 2003. I hasten to add that he in no way endorsed, and is in no way responsible for, my legal analysis of those facts.

service therein.”<sup>90</sup>

In my view, it is wrong for the Supreme Court to take license with the constitution, particularly with those provisions designed to cabin its own members’ power. Compounding the difficulty, the waiver provision of the rule broadens the scope of the license taken, empowering a wily Chief Justice (who, after all, assigns judges to the Appellate Division in the first place)<sup>91</sup> to solicit waivers and thereby assign the particular judge she desires.<sup>92</sup> Even if the selection is made in complete good faith, there is a considerable risk of suspicion, especially in a “politically critical” case, that it was not.

The danger, of course, is particularly great in a case where the Supreme Court is otherwise equally divided. Moreover, using a

---

<sup>90</sup> *Conversations*, *supra* note 64, at 1403. Unfortunately, Schnitzer did not discuss the argument, made at length above, that the constitution is best interpreted and was originally understood by Vanderbilt and the Supreme Court as making the circumstances in which an assignment could be made at all similarly “automatic and immune from discretion.” *Cf. id.* at 1405 (noting that “the Chief Justice alone decides whether it is necessary to call up temporary replacements from the superior court. Since a substitute judge may tip the scale on a divided court, the issue of whether to fill a vacant slot would only intensify the differences if left to the Supreme Court.”). Moreover, I think he was clearly in error to state that the rule change was made “once the supreme court began to function”; the change was not made until nearly two decades later. Note that Schnitzer was one of the drafters of the Report of the Judiciary Committee discussed above. *See id.* at 1393.

<sup>91</sup> N.J. CONST. art. VI, § 7, ¶ 2 (“The Chief Justice . . . shall assign Judges of the Superior Court to the Divisions and Parts of the Superior Court . . .”). Although the Constitution also requires that assignments to the Appellate Division be for “terms fixed by rules of the Supreme Court,” *id.*, there do not appear to be any such rules.

Waivers and assignment orders under Rule 2:13-2(a) are neither listed in the docket of particular cases nor available at the Office of the Clerk of the Supreme Court. Indeed, it is not even clear how much of the process is done in writing. *Cf. State v. Pillo*, 15 N.J. 99, 102-03, 104 A.2d 50, 51 (1954) (Brennan, J.) (noting that the power of the Chief Justice to assign a county judge to sit in Superior Court is not limited to the power to assign a judge for a particular case and therefore would not “ordinarily find its way into the records of individual cases,” and that the “practice is to file the original of the assignment with the Clerk of the Supreme Court and a copy in the office of the Administrative Director of the Courts”).

<sup>92</sup> *See Bennett & Rubinfeld*, *supra* note 24 (discussing possible bias in temporary assignments by Chief Justice to Supreme Court of California); Comment, *The Selection of Interim Justices in California: An Empirical Study*, 32 STAN. L. REV. 433 (1983) (same); H. John Rogers, *Appointment of Substitute Judges: The Proverbial Wreck Looking for a Place to Happen*, W. VA. LAW. 14 (Oct. 2000) (asserting that because of the unbounded power of the chief justice of West Virginia to assign a substitute judge, “as a de facto matter the chief justice is given a second, and occasionally a third vote”).

In New Hampshire, the unbridled discretion of the Chief Justice regarding temporary assignments to the Supreme Court led to an accusation that in a contentious divorce case involving Justice Stephen Thayer, the Chief Justice attempted to rescind the assignment of a particular judge after Thayer objected to that judge. The Chief Justice was impeached, but not convicted. *See Cynthia Gray, Supreme Court / Legislature at Odds in New Hampshire*, 84 JUDICATURE 291 (2001).

temporary judge to break a tie in the Supreme Court in a case from the Appellate Division is peculiarly misguided when one compares the alternative: Since an equally divided Supreme Court affirms the judgment below, in effect, those judges who decided the case in the Appellate Division (and there will always be at least two<sup>93</sup>) serve as tie-breakers. In contrast, if the Chief Justice temporarily assigns a particular judge to the Supreme Court in order to break the tie, that single judge is the tie-breaker. Is there any reason at all to prefer a single tie-breaking judge designated by the Chief Justice to the two (or three) tie-breaking judges that decided the case in the Appellate Division?<sup>94</sup>

In 1978, the Court amended the rule further, this time to

---

<sup>93</sup> See N.J. R. 2:13-2(b) (providing that two judges of the Appellate Division may decide an appeal, but that a "panel of 2 judges to which an appeal is submitted may elect to call a third judge to participate in the decision . . . and shall do so if the 2 judges cannot agree as to the determination"). As Judge Pressler notes, this "rule does not intend an affirmance of the order or judgment appealed from by reason of an equally split appellate panel." Sylvia Pressler, *Current N.J. Court Rules*, cmt. N.J. R. 2:13-2(b) (Gann 2003).

<sup>94</sup> Perhaps one might contend that the difference is in precedential effect, arguing that a majority opinion of the Supreme Court (even if the majority is formed by a temporarily assigned judge) is binding precedent, while an affirmance by an equally divided court lacks precedential effect. At common law, however, the rule was that an affirmance by an equally divided court *did* have precedential force. See Reporter's Note following *Krebs*, 14 F. Cas. at 862.

The influence of an opinion, on the minds of professional persons, will depend on the character of the judge who delivers it, and on the number of judges who unite in it: but the authority of a judgment of a supreme tribunal, as establishing a principle and settling the law, is the same whether the court be full and unanimous, or partial and divided. A judgment affirmed by a divided court binds inferior courts, and of course is a precedent in the court in which it was entered.

*Id.* In 1998, the Appellate Division decided, in what it viewed as a case of first impression in New Jersey, to follow the current majority rule, *see, e.g.*, *Neil v. Biggers*, 409 U.S. 188 (1972), that an affirmance by an equally divided court lacks precedential weight. *Abbamont v. Piscataway Township Bd. of Educ.*, 314 N.J. Super. 293, 301, 714 A.2d 958, 961 (App. Div. 1998). When the Supreme Court affirmed the judgment, it did not directly address the question of precedential value in its per curiam opinion, although three justices joined a brief concurring opinion indicating their view that an affirmance by an equally divided court has "no precedential weight." 163 N.J. 14, 15, 746 A.2d 997, 997 (1999) (Veneiro, J., joined by Poritz, C.J., and Garibaldi, J., concurring); *see also* Robert Laurence, *A Very Short Article on the Precedential Value of the Opinions From an Equally Divided Court*, 37 ARK. L. REV. 418, 425-27 (1983) (surveying both the majority and minority view on the issue). If one believes that the primary job of courts is to answer legal questions and therefore that obtaining a binding precedent is sufficiently important, one could return to the common law rule. Even if one takes this position, the basic question remains: Is there any reason to prefer binding precedent established by a single judge temporarily assigned, in contrast to binding precedent set by multiple judges of the Appellate Division?

authorize the temporary assignment of “one or more retired justices of the Supreme Court who are not engaged in the practice of law and who consent thereto.”<sup>95</sup> Even if one believes, contrary to the analysis above, that the Supreme Court’s rule making power permits it to define all Superior Court judges assigned to the Appellate Division as “senior in service” to all Superior Court judges assigned to other divisions, by no stretch of the imagination is a retired justice a judge of the Superior Court.

Instead, this amendment appears to rest on a 1975 statutory provision permitting “any justice of the Supreme Court who has retired [to] be recalled by the Supreme Court for temporary service in the Supreme Court . . . .”<sup>96</sup> Prior to that amendment, the statute authorized recall of a retired judge or justice only if he or she had “not attained the age of 70 years,”<sup>97</sup> the mandatory retirement age set in the constitution.<sup>98</sup> To the extent they purport to authorize a retired justice to sit temporarily in the Supreme Court, both versions conflict with the constitution by altering the constitution’s specification of who is to be assigned temporarily to the court.<sup>99</sup>

## VI

### THE UNCONSTITUTIONALITY OF RECALLING JUSTICES OR JUDGES OVER THE AGE OF SEVENTY

The 1975 amendment to the judicial retirement statute did far more than simply authorize retired Supreme Court Justices to be recalled after the age of seventy: it permitted the recall of *any* judge who has passed the mandatory retirement age of seventy. As the

---

<sup>95</sup> N.J. R. 2:13-2. As Judge Pressler notes, “This paragraph was amended, effective September 11, 1978, to permit the recall, in the event of an absent or disqualified justice, of a retired justice of the Supreme Court who is not engaged in the practice of law, provided he consents to such service.” Sylvia Pressler, *Current N. J. Court Rules*, cmt R. 2:13-2 (Gann 2003); *see also* 80 N.J. vii (1979) (noting recall of retired Justice Jacobs for temporary service during absence of Justice Sullivan).

<sup>96</sup> N.J.S.A. § 43:6A-13(b).

<sup>97</sup> *See* historical note set out after N.J.S.A. § 43:6A-13; L. 1973, c. 140, § 13. *See also* L. 1964, c. 135, § 4 (permitting the retirement of judges with twenty-five years of service when between sixty and seventy years of age and providing for recall of judges so retired).

<sup>98</sup> N.J. CONST. art. VI, § 6, ¶ 3 (“Such Justices and Judges shall be retired upon the attaining the age of seventy years.”).

<sup>99</sup> In addition, the statute vests the recall power in the Supreme Court, while the constitution vests the assignment power in the Chief Justice. Moreover, to the extent that the statute can be read to authorize more than seven justices to sit on the court, it conflicts with the constitution’s requirement that the court consist of seven.

sponsor's statement explained:

This bill removes the restriction on the employment of retired judges who are 70 years of age or older on special assignments by the Chief Justice in the same manner as retired judges under 70 years of age may presently be assigned.<sup>100</sup>

Pursuant to this provision, dozens of retired judges are currently recalled and temporarily assigned.<sup>101</sup> It is, therefore, of considerable practical importance to the administration of justice. It is also unconstitutional.

While addressing a mandatory retirement age, the Judiciary Committee of the Convention took note of the federal system under which a judge can retire yet continue to sit, with specific mention made of Justice Van Devanter sitting in federal district court in New York.<sup>102</sup> Vice-Chairman Nathan Jacobs observed that "even if you do have a so-called compulsory retirement age, you may make adequate provision for allowing the court to use these retired judges to the extent of their capacities specifically considered."<sup>103</sup> The next day, former Chief Justice Thomas Brogan and Justice Frederic Collie voiced support for "setting up a plan for drafting some of the very able and capable men who might have been forced to retire."<sup>104</sup>

But no such provision was included in the Constitution.<sup>105</sup> Yet nearly thirty years later, it was none other than Nathan Jacobs, by

---

<sup>100</sup> Statement accompanying ASSEMB. B. NO. 1419 (introduced April 1, 1974). Assemblyman Bate argued that the bill "would help speed the administration of justice and, by securing the benefit of years of judicial experience, increase the quality of justice." *Id.*

<sup>101</sup> See 360 N.J. Super. xx-xxii (listing thirty-six judges as retired and temporarily assigned); 343 N.J. Super. xx-xxii (listing forty-four judges as retired and temporarily assigned). It is possible that some of these judges may be under the age of seventy, and therefore would have been eligible to be recalled even prior to the 1975 amendment. The decline in the number of such judges may be due to budget considerations. See *Report of the State of the Judiciary of the State of New Jersey*, N.J. L.J. May 27, 2002, at 788; Jim Edwards, *Recall Judge's Days are Numbered*, N.J. L.J. March 11, 2002, at 977.

<sup>102</sup> 4 N.J. CONST. CONV. 168 (July 2, 1947). For an explanation of the judicial duties that can be performed by a retired Justice of the United States Supreme Court, see Hartnett, *supra* note 14, at 647-49.

<sup>103</sup> 4 N.J. CONST. CONV. 169 (July 2, 1947).

<sup>104</sup> 4 N.J. CONST. CONV. 214 (July 3, 1947).

<sup>105</sup> See also *Conversations*, *supra* note 64, at 1401 (stating that it was "[c]ertainly not" "contemplated that judges, once retired at age 70, could be recalled"). And even Justice Collie, who advocated such a plan, did not think it should apply to the court of last resort. 4 N.J. CONST. CONV. 214-15 (July 3, 1947); see also Garrow, *supra* note 87, at 1036 (noting that Chief Justice Arthur Vanderbilt was "strongly in favor" of an amendment to the United States Constitution requiring mandatory retirement of United States Supreme Court Justices and that he favored setting the mandatory retirement age at 70).

then a Justice of the New Jersey Supreme Court nearing retirement, who was the moving force behind the 1975 statute.<sup>106</sup> He relied on an advisory opinion of the Massachusetts Supreme Judicial Court that a proposed state constitutional amendment providing that “upon attaining seventy years of age . . . judges shall be retired” could coexist with a statute providing for recall of those judges.<sup>107</sup> This reasoning is echoed in the sponsor’s statement accompanying the 1975 amendment:

The New Jersey Constitution in Article VI, Section VI, paragraph 3 requires that judges retire at age 70. This mandatory retirement does not however prevent the utilization of such senior judges on a special assignment basis, if they so desire, at the pleasure of the Chief Justice.<sup>108</sup>

The difficulty with this argument, however, is that the cited provision is not the only relevant provision in the New Jersey Constitution. The Constitution not only provides that justices and judges “shall be retired” at seventy,<sup>109</sup> but also specifically provides that “No Justice of the new Supreme Court or Judge of the Superior Court shall hold his office after attaining the age of seventy years, except, however, that such Justice or Judge may complete the period of his term which remains unexpired at the time the Constitution is adopted.”<sup>110</sup>

Indeed, the Massachusetts decision that inspired Justice Jacobs specifically contrasted the Massachusetts provision with those of other states that made judges after a certain age ineligible to “hold the office,” or “hold his office” and concluded:

By contrast with the above provisions, the amendment before us merely provides that judges “shall be retired.” It is significant that the amendment does not provide that a judge shall not hold

---

<sup>106</sup> *Conversations*, *supra* note 64, at 1401-02.

<sup>107</sup> Opinion of the Justices to the Senate, 284 N.E.2d 908 (Mass. 1972); *see* *Conversations*, *supra* note 64, at 1401-02 (recounting Jacobs’ reliance on a decision from the Massachusetts Supreme Judicial Court but not naming the decision).

<sup>108</sup> Statement accompanying ASSEMB. B. NO. 1419 (introduced April 1, 1974).

<sup>109</sup> N.J. CONST. art. VI, § 6, ¶ 3.

<sup>110</sup> *Id.* at art. XI, § 4, ¶ 1. In accordance with this provision, Justice Ackerson, who had been a circuit judge serving successive seven year terms beginning in 1924 continued to sit until January of 1952, well after his seventieth birthday on October 15, 1950. *See supra* note 85; *see also* *The Political Graveyard*, available at <http://politicalgraveyard.com/bio/achard-adamowski.html> (visited Nov. 4, 2003) (stating that Henry E. Ackerson, Jr., was born on October 15, 1880, and served as a circuit judge from 1924 until 1947); *Eder v. Hudson County Cir. Ct.*, 104 N.J.L. 260, 140 A. 883 (1928) (dismissing a writ of certiorari brought to review orders issued by Judge Henry E. Ackerson of the Circuit Court); *Tuthill v. Hudson & Manhattan R.R. Co.*, 10 N.J. Mis. 219, 158 A.342 (1932) (Ackerson, Cir. Ct. J., granting remittitur).

office after reaching a certain age. Accordingly there is no conflict between the precise language of the amendment and the bill.<sup>111</sup>

Unlike the Massachusetts Constitution, the New Jersey Constitution explicitly bars Justices and Judges (other than those in office under the 1844 Constitution) from "holding his office" after age seventy. As the Supreme Court of the United States once stated in holding that a federal judge who retired from active service without resigning still retained the office (and its constitutional guarantee against diminishment of salary), "It is scarcely necessary to say that a retired judge's judicial acts would be illegal unless he who performed them held the office of judge."<sup>112</sup>

For this reason, once a judge or justice in New Jersey reaches the age of seventy, he or she must cease performing judicial acts. Note that formal recall from retirement is not the only situation in which this issue arises. As we have seen,<sup>113</sup> justices of the New Jersey Supreme Court have, since 1971, participated in cases after retirement, apparently on the ground that the case was argued and submitted prior to retirement. In the first of such cases, Justice Haneman had retired before the age of seventy, and concluded his participation prior to reaching seventy.<sup>114</sup> Two years later, however, when Justice Proctor retired on his seventieth birthday, he, too,

---

<sup>111</sup> *Opinion of the Justices*, 284 N.E.2d 912.

<sup>112</sup> *Booth v. United States*, 291 U.S. 339, 350 (1934). The Court added, "It is a contradiction in terms to assert that one who has retired in accordance with the statute may continue to function as a federal judge and yet not hold the office of a judge." *Id.* But see *Claremont Sch. Dist. v. Governor*, 712 A.2d 612 (N.H. 1998) (upholding recall of a retired justice despite a constitutional prohibition on holding judicial office after seventy on the ground that a retired justice remained a "judicial officer" although he no longer held judicial office, without explaining how one can be an officer without an office); cf. *Werlein v. Calvert*, 460 S.W.2d 398 (Tex. 1970) (holding that, where state constitution required the Legislature to provide for the retirement of judges and their "reassignment to active duty where and when needed," and Legislature provided that retired judges remained "judicial officers," a constitutional amendment adding that judicial offices "become vacant" when the incumbent reaches the age of seventy-five did not apply to the positions held by retired judges because a "retired judge assigned to active duty [and thereby] authorized to exercise the powers of an office" does not "hold an office that could possibly become vacant."). See also *State ex rel. New Wash. Oyster Co. v. Meakim*, 208 P.2d 628 (Wash. 1949) (holding, under Washington law, that where judge retires he relinquishes his office, and therefore a statute purporting to authorize the recall of retired judges is unconstitutional). Strangely, *Meakim* is cited in *Opinion of the Justices* as upholding the statute against constitutional objection. *Opinion of the Justices*, 284 N.E.2d 912.

<sup>113</sup> See *supra* text accompanying notes 83-88.

<sup>114</sup> *Williams v. Williams*, 59 N.J. 229, 281 A.2d 273 (1971). Justice Haneman was born on April 25, 1902, NEW JERSEY LEGISLATIVE MANUAL 277 (1969), and retired on March 1, 1971. See 57 N.J. vii (1971).



continued to participate in decisions.<sup>115</sup> Since that time, it has become a regular practice.<sup>116</sup>

Without a doubt, many judges and other public officials can perform their duties faithfully and well beyond the age of seventy. But prohibitions on holding judicial office after a certain age function as more than simply blunderbuss methods of attempting to avoid the embarrassment of individualized determinations of competency.<sup>117</sup> Instead, they also function, like fixed terms, to foster turnover in office and reduce the vesting of "so much power in people whose formative experiences are from an age decidedly different from that of most of the current population."<sup>118</sup>

It is possible that those who began the practice of sitting after seventy in 1973 and those who supported the 1975 amendment simply overlooked the provision of the New Jersey Constitution barring judges over seventy from holding office because that provision is contained in Article XI, which addresses the transition from the 1844 Constitution to the 1947 Constitution, rather than in Article VI, the Judiciary article.<sup>119</sup> Although the provision may have been inadvertently overlooked, it should not be deliberately ignored. Absent a constitutional amendment, justices and judges in New Jersey may not hold their office once they have attained the age of seventy,

---

<sup>115</sup> See, e.g., *Passaic Daily News v. Blair*, 63 N.J. 474 (1973). Justice Proctor was born on June 16, 1903, see NEW JERSEY LEGISLATIVE MANUAL 275 (1969), and retired on June 16, 1973. See 63 N.J. vii (1973).

<sup>116</sup> In most, but not all, of the cases listed in note 85, *supra*, the retired justices had passed the mandatory retirement age of seventy.

<sup>117</sup> This is not to deny the importance of this function. See Garrow, *supra* note 87 (detailing the difficulties caused by mental decrepitude on the Supreme Court of the United States).

<sup>118</sup> Lucas A. Powe, Jr., *Old People and Good Behavior*, in CONSTITUTIONAL STUPIDITIES / CONSTITUTIONAL TRAGEDIES 77-79 (William Eskridge & Sanford Levinson, eds., 1998) (arguing for fixed terms rather than life tenure for federal judges).

Even if their minds are every bit as good as when they were appointed, there is no good reason in a democracy to vest so much power in people whose formative experiences are from an age decidedly different from most of the current population . . . . It is one thing to elect such individuals to govern; it is another to have them govern because elected officials approved of them twenty or thirty years earlier.

*Id.*; cf. *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (upholding a mandatory retirement provision for state judges against a challenge based on both the Age Discrimination in Employment Act and the equal protection clause).

<sup>119</sup> Or perhaps, Justice Jacobs, like Chief Justice Vanderbilt before him, simply found some other way to achieve the goal he had sought at the convention. The statute took effect on February 14, 1975; Justice Jacobs retired on February 27, 1975. See 66 N.J. vii (1975).

and therefore may not perform judicial acts.<sup>120</sup>

### CONCLUSION

It is time to make clear when a temporary assignment to the New Jersey Supreme Court will be made and who is to be assigned. The clear rule that should be adopted—indeed, that I have argued is constitutionally required—is the rule adopted upon the formation of the new Supreme Court under the Constitution of 1947. That is, a temporary assignment should be made only when necessary to make a quorum, and the judge or judges assigned should be the judge or judges senior in service in the Superior Court, regardless of Division. Moreover, under the New Jersey Constitution, no justice or judge should hold office after reaching the age of seventy.

For some who think that courts of last resort exist to answer legal questions, such impediments to the temporary assignment of judges to the Supreme Court of New Jersey may appear burdensome. However, the burden of occasionally waiting for another case when a full bench is available to decide the issue is modest. In addition, in a statutory case, the legislature has the ability to answer the legal question without the delay. In fact, it took the New Jersey Assembly, Senate, and Governor all of sixteen days to amend the statute involved in *Manzie*—less time than it took the court to deny the petition for rehearing seeking a tie-breaking judge.<sup>121</sup>

But for those who believe that even courts of *last resort* should first be *courts*, the original practice of the new New Jersey Supreme Court serves as a healthy reminder that the primary job of a court is to decide cases. A court can do that job even if there are some empty seats on the bench and even if it is evenly divided.

---

<sup>120</sup> Notice what this analysis means for *McNeil v. Legislative Apportionment Comm.* With neither Judge Pressler nor Justice Coleman sitting in the case, there would have been only two votes to reverse the Appellate Division, and Justices Verniero, Albin, and LaVecchia, rather than dissenting, would have been able to control the judgment and remand the case for further proceedings to determine if legislative districts could be drawn that would comply with both the state constitution and the federal Voting Rights Act.

<sup>121</sup> See Donna Leusner, *DiFrancesco Slams the Door on No Early Release Loophole*, STAR-LEDGER (Newark, N.J.), June 30, 2001, at 23; Kathy Barrett Carter, *Manzie's Pared Prison Term Stands*, STAR-LEDGER (Newark, N.J.), July 19, 2001, at 21.